Supreme Court, U.S.
FILED

No. 09-565

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IN THE

Supreme Court of the United States

LANISE BASON,

Petitioner,

v.

JOAN N. YUKINS,
Warden, Robert Scott Correctional Facility,
Plymouth, Michigan,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 5, 2009

Questions Presented

When Lanise Bason saw her abusive husband walking to a meeting with his mistress, she ran him over with her car and killed him. At trial, however, her counsel failed to submit timely an expert report on battered-woman syndrome. In her Michigan appeal, Ms. Bason claimed that counsel had been ineffective for not advancing heat-of-passion and battered-woman theories. But she did not allege the specific failure to put the expert report in on time.

The questions presented therefore are:

1. Is the test for factual exhaustion of a habeas claim, as some appellate cases hold, whether the petitioner alleged the same specific fact in State court; or is it, as this Court has held, whether a new fact supplements the State-court claim without fundamentally altering it?

2. On detecting a new claim, may a court of appeals overlook an express waiver of exhaustion, and invoke default *sua sponte*, without giving petitioner notice and an opportunity to respond—thus taking the minority views in two circuit splits?

3. Here, did the Michigan court misapply *Strickland* by using a substantial-defense test, misapply *Wiggins* by deferring to "strategy," unreasonably determine facts as to heat of passion, and unreasonably determine that the abandonment of both defense theories was a "strategic decision"?

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Lanise Bason prays that the Supreme Court grant a writ of certiorari to review the judgment below of the Court of Appeals for the Sixth Circuit.

Opinions Below

The Sixth Circuit's opinion, App. 3a–5a, is reported at 328 F. App'x 323. The district court's opinion, App. 9a–27a, is unreported but is available at 2005 WL 1529726.

The Michigan Supreme Court's denial of review, App. 28a–29a, is reported at 468 Mich. 905, 661 N.W.2d 581. The opinion of the Michigan Court of Appeals, App. 30a–38a, is unreported but is available at 2002 WL 31012614.

Jurisdiction

The court of appeals entered judgment on May 12, 2009. A timely petition for rehearing was denied on August 7, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

The Sixth Amendment requires that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

The Fifth Amendment provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V. The Fourteenth Amendment provides: "No State shall . . . deprive any person of life,

liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), provides:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> . . .
>
> (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT

Lanise Bason has languished behind bars since 2000, when the State of Michigan convicted her of murder. Against that charge, Ms. Bason had two defense theories, but neither was put forward at trial. The State courts held that defense counsel

had made a "strategic" decision to abandon both theories. In the Sixth Circuit, however, Ms. Bason pointed to transcript evidence showing otherwise.

The court of appeals avoided this evidence by raising procedural defenses *sua sponte*. In so doing, the court took sides in a conflict in principle over how to determine whether a habeas claim is factually exhausted. The Sixth Circuit also took sides in two circuit splits—over whether waiving exhaustion waives a related procedural default, and over whether courts may raise procedural defenses *sua sponte*, without providing notice or an opportunity to be heard. To clarify the law on these matters, this Court should grant certiorari.

A. Ms. Bason Killed Her Abusive Husband When She Saw That He Was About To Commit Adultery.

When Lanise Bason was 14 years old, she fell in love with the wrong man: Bryant Branch. In 1995, she married him.

Mr. Branch was a philanderer. He fathered ten children—eight of them by women other than his wife. Ms. Bason knew her husband was unfaithful to her, and that he was having an affair with a woman named Wynter White.

Mr. Branch lived a life of drugs and alcohol and criminal behavior. He was shot, he shot his sister's boyfriend, and he was said to have "beat[en] a murder case." In June 1998, Ms. Bason applied for a protective order against her husband. In the application, she stated, "[M]y husband has been

abusive & violent[.] [H]e has beat me up several times[.] I am very scared of him."

On February 12, 1999, Ms. Bason filed for divorce. Ten days later, Mr. Branch beat his wife and gave her a black eye. The next morning, the couple resumed arguing after Mr. Branch phoned another woman. Mr. Branch then left Ms. Bason's house on foot.

Ms. Bason got into her car to find her husband. As it happened, he was walking to a house where, as she knew, he had often seen Wynter White. When Ms. Bason saw her husband walking toward his trysting place, she accelerated. Her car jumped a curb, traversed several lawns, and struck Mr. Branch, who was killed.

Ms. Bason suffered serious injuries and was in a coma for days. While she was on medication and without counsel, the police took a statement. She was then arrested.

The arraigning judge found "mitigating circumstances" and bound over "on murder two subject to any heat of passion." The court said, "I believe that she was suffering under the heat of passion." App. 112a. Ms. Bason pled not guilty.

B. Counsel Failed To Produce Timely a Forensic Psychologist's Report on Battered-Woman Syndrome.

Ms. Bason's lawyer, Wendy Barnwell, told Judge Vera Massey Jones that the defense would call eight witnesses. One would be a psychologist, Dr. Firoza Van Horn. The court appointed Dr. Van

Horn to render her opinion as to state of mind, and the defense witness list included her as a "Forensic Psychologist (Battered Woman Syndrome)."

But on April 17, 2000—the day of trial—the prosecutor said that she had received Dr. Van Horn's report only that morning. App. 121a. The court then said, "It wasn't turned over correctly. I'm not going to allow it to be used." App. 128a.[1]

Barnwell objected to this ruling. *Id.* She explained, "Your Honor, with respect to my client's health, her mental status . . . , that's a crucial part of our defense, and I think it would highly prejudice her." App. 129a. This objection was overruled, and the bench trial began. App. 129a–30a.

The State predicted that it would show that Ms. Bason "had the intent to kill, or the intent to cause great bodily harm," or "willful and wanton disregard" for her actions. Barnwell responded, "[T]hey will not be able to prove her state of mind." App. 116a. Barnwell said her client "was a battered woman," referred to the protective order, and predicted that witnesses would testify to "abuse," "hitting around," and "beating up" of Ms. Bason by her husband. App. 116a–18a. Barnwell also described the love triangle among Ms. Bason, Mr. Branch, and Wynter White, and said that when Ms. Bason saw her husband

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[1] The transcript does not specify, and we are not admitted in Michigan, but late production of the report appears to have violated that State's evidentiary rules. *See* Mich. R. Crim. P. 6.201 (discovery); Mich. R. Evid. 706 (appointed experts).

walking to his trysting place, she was "provoked and in hot blood." App. 116a–18a, 118a.

The State called 16 witnesses--police officers, neighbors, and Ms. White. Together they established that Ms. Bason had driven at least 40 miles an hour, for 100 feet in a straight line, and killed her husband.

Then the State tried to bring the statement in. So the court held a *Walker* suppression hearing. The defense called four witnesses, including Dr. Van Horn. But the only clue that they were *Walker* witnesses, not trial witnesses, was this:

> THE COURT: A Walker hearing?
> MS. BARNWELL: Yes, your Honor.
> THE COURT: All right, let's go.
> [PROSECUTOR]: Right, not the trial.
> THE COURT: Not the trial.
> [PROSECUTOR]: Correct.
> MS. BARNWELL: Yes, your Honor.

JA 738. Before testifying that Ms. Bason had been on codeine while the police took the statement (whereupon Judge Jones suppressed it), Dr. Van Horn also testified that Ms. Bason had been "abused for many years" by her husband. JA 908.

Six weeks after trial began, the State rested. Barnwell then failed to move for a directed verdict, and rested as well. JA 975. These events took place—or failed to take place—in rapid succession:

> [PROSECUTOR]: Your Honor, the People would rest at this time.

> THE COURT: Does Defense wish to put in any evidence?
> MS. BARNWELL: Your Honor, I've discussed this case with my client. . . . We talked about the possibility of not bringing on a case. After discussing this matter again today with my client, and her grandmother, and her pastor . . . we rest.

Barnwell closed by arguing that the State had not met its burden even "as to manslaughter." App. 132a. She said that "nothing ha[d] been proven." App. 133a. But nowhere in her closing statement did Barnwell mention "state of mind," "hot blood," "heat of passion," "self-defense," or "battered woman." App. 132a–34a.

The court found Ms. Bason guilty of murder. App. 138a. At sentencing, the court noted that "there was no showing of any mental problem or anything else" on which to base a reduction. So Judge Jones sentenced Ms. Bason to 18 to 50 years.

C. The Trial Court: "I Have No Evidence" As to the "State of Mind of the Defendant."

Ms. Bason moved for additional findings regarding innocence and manslaughter. In considering this motion, Judge Jones said:

- "The problem is that there was no evidence . . . for voluntary manslaughter."
- "I didn't hear from any physician. I didn't hear from anybody who could have told me anything about an emotional excitement . . . . I have no evidence."

- "I heard Dr. Van Horn . . . in a Walker Hearing. . . . I do have the ability to put that out of my mind because that's all it was for, was for the Walker hearing."
- "[W]e never got around to the state of mind of the defendant at the time of the act."
- "I feel like I didn't hear a defense."

So Judge Jones held a hearing. At last Dr. Van Horn testified that in her expert opinion, Ms. Bason was "not criminally responsible" because she had been "abused physically." App. 145a. Then the State objected. *Id.* There ensued a six-minute, off-the-record colloquy, after which the court stated, "[T]here is a defense that could have been raised," and "I'm quite sure there's going to be a motion for ineffective assistance of counsel." App. 145a, 146a.

Indeed there was. At the motion hearing, Ms. Bason was represented by a new lawyer, George Corsetti. The only witness was Barnwell. Corsetti asked why Barnwell did not move for a directed verdict. She replied, "That's the first time I never did. I plain out forgot when [sic] I was." Corsetti also asked whether, when Barnwell rested, she realized that Dr. Van Horn's *Walker* testimony was not trial testimony. Barnwell said, "I should have taken a break." JA 1228. So Corsetti asked the question again, and Barnwell dodged it again. When asked whether Ms. Bason had known that *Walker* testimony was not for the trial, Barnwell answered, "I don't know." Barnwell did know that witnesses had been ready to testify to "fights,"

"violence," and "physical altercations" between Ms. Bason and her husband. JA 1231, 1240.

At the end of the ineffectiveness hearing, even the State admitted that "all of us, now that we've read the transcript and thought about this, would do things a little bit differently." JA 1260. But a motion for a new trial was denied.

D. The State Court of Appeals: The Failure To Present a Battered-Woman Theory Was "Strategic."

On appeal, Corsetti argued that Barnwell had failed to use a battered-woman theory. App. 94a–102a. But his brief did not mention the report.

The Michigan Court of Appeals noted that "there may have been evidence to support alternate defenses," but held that Ms. Bason had "failed to assert her right to such defenses or establish that those defenses were substantial." App. 38a. This was so, the court said, App. 34a, because

> the existing record does not establish that defendant honestly or reasonably believed she was in imminent danger of death or great bodily harm sufficient to establish a claim of self-defense. Nothing in the record shows that defendant killed Bryant because she feared for her life or that her state of mind was so affected by systematic and continual spousal abuse characteristic of the battered spouse syndrome that she feared some imminent harm by Bryant.

The State court held that even if Ms. Bason and her husband had argued after he phoned his mistress, there was cooling-off time between the call and the crash. App. 36a. As for Mr. Branch's adultery with Wynter White, the court described this as "the same situation [Ms. Bason] had been coping with for a lengthy period." *Id.*

Lastly, the court found that Barnwell "made a strategic decision to proceed on an accident theory and not to pursue the alternate theories." App. 37a. So the State appellate court affirmed. The Michigan Supreme Court denied review, although a dissenter would have remanded for a hearing on whether Barnwell had been ineffective. App. 29a.

E. The District Court: Counsel "Elected To Proceed" on an Accident Theory.

Ms. Bason's *pro se* federal petition included a broad ineffective-assistance claim. App. 82a, 67a. The petition alleged that "Heat of Passion . . . [was] not investigated" and that "Battered Spouse Syndrome was investigated but was not presented as a defense." App. 82a. An amendment alleged that Dr. Van Horn had arrived at a "conclusion" of battered-wife syndrome, App. 69a; that even so, Barnwell had failed to use the divorce complaint or the protective order, App. 70a; and that "Even for sentencing . . . counsel failed to use the expert witness," App. 71a. In sum, Ms. Bason alleged, "Counsel was ineffective for not presenting a defense or any mitigating evidence to support a lesser charge and a lenient sentence." App. 72a.

Ms. Bason moved that counsel be appointed. She also requested discovery, including "reports . . . by expert witnesses in regards to . . . Battered Wife Syndrome." These requests were denied.

In dismissing the petition, the district court quoted almost the entire Michigan Court of Appeals opinion. To it, the district court added the notion that a "failure to call witnesses . . . can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." App. 24a (quoting *Chegwidden* v. *Kapture*, 92 F. App'x 309, 311 (6th Cir. 2004) (unpublished) (which was quoting a Michigan court)). The district court held that Ms. Bason had not shown "that the other possible defenses were substantial or that any of those defenses would have altered the outcome at trial." App. 25a. So the court dismissed Ms. Bason's petition with prejudice. App. 27a. Later the district court did grant a certificate of appealability "as to Petitioner's ineffective assistance of counsel claim." App. 8a.

F. The Sixth Circuit: "We Decline To Consider" Counsel's Failure To Submit the Report.

On appeal, the State described Ms. Bason's claim as one that she had been denied effective assistance "through counsel's failure to present a defense" or "to advance defenses." The State also expressly conceded, by checking a box, that remedies had been exhausted. State Br. at ii (fact sheet). Contending that Ms. Bason had presented

her claim to the State courts, the State urged that AEDPA deference should apply. *Id.* at 2–5, 7, 8–9.

On January 24, 2008, Ms. Bason received the Van Horn report. She moved to supplement the record with it. At argument on February 1, 2008, the panel expressed concern that the district court had not seen the report. Other than this concern, the court did not ask about—and the State did not brief or argue—exhaustion or default.[2] Days later, the Sixth Circuit denied Ms. Bason's motion.[3]

Fifteen months later, the court of appeals handed down a 2.5-page, unpublished, *per curiam* decision. The decision divided Ms. Bason's claim into the following four "components," which the decision then denominated as "claims":

(1) "by failing to follow procedural rules, trial counsel caused the critical expert report to be excluded";

(2) "counsel 'forgot' to test the prosecution's case by moving for a directed verdict";

(3) "trial counsel failed to put on a case for the defense"; and

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[2] In the district court, the State purported to "assert[] any and all available defenses including failure to exhaust . . . and procedural default for each claim to which it is applicable." App. 50a. This formula cannot have preserved any issue, as it merely begged the question.

[3] Dr. Van Horn's report is therefore not in the Appendix. Ms. Bason is willing to lodge the report with the Clerk.

(4) "trial counsel also failed to present important mitigating evidence at sentencing."

App. 4a. As to the second and third "claims," the Sixth Circuit affirmed based on the district court's reasoning. App. 5a. The court "decline[d] to consider the merits of the first and fourth . . . claims," deeming them unexhausted and defaulted. *Id.*

REASONS FOR GRANTING THE WRIT

I.

Appellate Cases Disagree in Principle Over What Test Courts Should Use To Judge Whether a New Argument That Counsel Was Ineffective Raises a New Claim.

A federal court may grant habeas relief to a State prisoner if "it appears that the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). To exhaust, a petitioner must present, in State court, the "substantial equivalent" of the federal claim, *Picard* v. *Connor*, 404 U.S. 270, 278 (1971), so as to give the State "a 'fair opportunity' to apply controlling legal principles to the facts bearing upon" the claim, *Anderson* v. *Harless*, 459 U.S. 4, 6 (1982) (per curiam) (quoting and citing *Picard*, 404 U.S. at 276–77). The State petition "must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief"—or, in other words, "the facts

necessary to state a claim." *Gray* v. *Netherland*, 518 U.S. 152, 162–63 (1996).

"[T]here are instances," however, "in which the ultimate question . . . will be the same despite variations in . . . factual allegations urged in its support." *Picard*, 404 U.S. at 277. Notably, a petitioner may present new evidentiary affidavits in federal court, if this "supplemental evidence" does not "fundamentally alter the legal claim already considered by the state courts. . . ." *Vasquez* v. *Hillery*, 474 U.S. 254, 260 (1986).

This exhaustion jurisprudence, according to one treatise, has "not added much by way of workable guidelines." 17B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, VIKRAM DAVID AMAR, FEDERAL PRACTICE & PROCEDURE § 4264.3 (Thomson 3d ed. 2007). Federal courts "have done their best to apply the generalities announced in the Supreme Court decisions" to a variety of specific situations. *Id.* But confusion and disagreement have arisen. Indeed, some courts of appeals have espoused two or three standards. As a result, the leading habeas treatise can only describe what the law of factual exhaustion "seems to be." 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 23.3c(ii) (LexisNexis 5th ed. 2005).

A. Abiding by *Vasquez*, Some Cases Permit Factual Arguments That Supplement, but Do Not Fundamentally Alter, State Claims.

The Sixth Circuit, which failed to mention *Vasquez* here, has relied on it heavily elsewhere:

> The purportedly new evidence of [a second plea] offer does not "fundamentally alter" the claim that [counsel] failed to relay a favorable plea offer that [petitioner] would have accepted, as it would fit comfortably within the rule that "[u]nder *Vasquez* and allied decisions, the petitioner may supplement and clarify the record, *inter alia*, through . . . introduction of new factual materials supportive of those already in the record [or] presentation of additional instances of the same alleged violation."

Satterlee v. *Wolfenbarger*, 453 F.3d 362, 366 n.2 (6th Cir. 2006) (quoting 2 HERTZ & LIEBMAN, FEDERAL HABEAS PRACTICE § 23.3c, at 1088–89). Under this rule, after a petitioner argued in State court that counsel had identified a defense expert who agreed with the prosecution, and so testified at trial, then in federal court the petitioner could "marshal[ ] new facts to support his claim" that counsel had been "ineffective in handling the scientific evidence." *Richey* v. *Bradshaw*, 498 F.3d 344, 352, 353 (6th Cir. 2007). The "legal basis" of the claim "remained constant," and the new facts "merely substantiate[d] it." *Id.* at 353. Similarly, two claims—that a witness on battered-woman syndrome was improperly denied (for State eviden-

tiary reasons) and that counsel was ineffective in failing to consult such an expert—can be so "inherently intertwined" that a petitioner presents the one by presenting the other. *Dando* v. *Yukins*, 461 F.3d 791, 797 (6th Cir. 2006).

The Seventh Circuit likewise has considered state-of-mind evidence not presented to State courts. When a petitioner consistently asserted in State court that trial counsel had been ineffective for failing to present a defense of post-traumatic stress disorder, his new argument to this effect in federal court, based on the transcript of his juvenile hearing, did not "change the substance" of the argument, but "merely supplie[d] an additional piece of evidence. . . ." *Boyko* v. *Price*, 259 F.3d 781, 789 (7th Cir. 2001).

Recognizing confusion among the circuits, the Fifth Circuit has held that if a petitioner's State brief argued that counsel should have interviewed a named eyewitness, the petitioner had raised the issue sufficiently, so that the witness's affidavit, introduced in federal court, did not alter the claim. *Anderson* v. *Johnson*, 338 F.3d 382, 388 (5th Cir. 2003). This result, the court noted, was "contrary" to holdings of other circuits on "somewhat analogous (but distinguishable) facts." *Id.* at 389 n.26 (saying "we abide by . . . *Vasquez*.").

The issue in *Vela* v. *Estelle*, 708 F.2d 954 (5th Cir. 1983), *cert. denied*, 464 U.S. 1053 (1984), was similar to that here—how should a court treat ineffectiveness allegations that "were not explicitly enumerated," 708 F.2d at 958, in State court? The

Fifth Circuit noted that "counsel's performance is to be evaluated on the basis of the *totality* of the circumstances in the entire record" and that "*all* the instances of ineffective assistance . . . were contained in the trial record reviewed by the state habeas court. . . ." *Id.* at 959 (italics original, internal quotation marks omitted). The allegedly new facts, therefore, were "not new at all," and the court considered them. *Id.* at 960. *Vela* seems to remain Fifth Circuit law where, as here, a habeas petitioner raises a broad ineffective-assistance claim and the State court has assessed that claim by reviewing the entire record. *See Ries* v. *Quarterman*, 522 F.3d 517, 526 n.4 (5th Cir. 2008) (distinguishing claim in *Vela* as "broad").[4]

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[4] A treatise endorses the *Vela* approach:

> Particularly in cases in which the proper analysis of the petitioner's legal claim demands that particular allegations of error be judged against the totality of circumstances at trial, and certainly if it appears that the state courts examined the full record in that light, a federal habeas court can properly conclude that the exhaustion doctrine is satisfied. Factual matters appearing in the record, and simply spotlighted with greater care in a prisoner's federal petition or brief, are not, in truth, *new* at all.

POSTCONVICTION REMEDIES § 5.10 (West 2009) (italics original); *see also id.* n.53. To similar effect is *Peoples* v. *United States*, 403 F.3d 844 847–48 (2005) (Easterbrook, J.) ("[I]neffective assistance of counsel is a single ground for relief no matter how many failings the lawyer may have displayed. Counsel's work must be assessed as a whole; it is the overall deficient performance, rather than a specific failing, that constitutes the ground of relief."); *see also*

B. Other Cases Use a Specific-Allegation Test, or Ask Whether Petitioner's Federal Argument Is "More Specific and Powerful."

In apparent tension with both *Vasquez* and *Boyko*, however, many Seventh Circuit cases require petitioners to have identified, in State court, "the specific acts or omissions of counsel" alleged to be violative. *Johnson* v. *Hulett*, 574 F.3d 428, 432 (7th Cir. 2009); *accord Pole* v. *Randolph*, 570 F.3d 922, 935 (7th Cir. 2009) (requiring petitioner to have raised in State court "particular factual basis" for federal claim); *Momient-El* v. *DeTella*, 118 F.3d 535, 541 (7th Cir. 1997) (asking if petitioner identified in State court "the specific acts or omissions of counsel that form the basis for his claim of ineffective assistance") (internal quotation marks omitted).

Hence a "failure to alert the state court to a complaint about one aspect of counsel's assistance" may lead to default. *Stevens* v. *McBride*, 489 F.3d 883, 894 (7th Cir. 2007). The Eleventh Circuit has stated the rule similarly: "[P]etitioners may not present particular factual instances of ineffective assistance of counsel in their federal petitions that were not first presented to the state courts." *Kelley* v. *Sec'y, Dep't of Corr.*, 377 F.3d 1317, 1344 (11th Cir. 2004) (collecting cases).

Thompson v. *Battaglia*, 458 F.3d 614, 616 (7th Cir. 2006) (Wood, J.) (extending *Peoples* to reach two factual arguments that the petitioner had not raised in State court).

Courts also ask whether a federal argument places the claim "in a significantly different and stronger evidentiary posture than it was when the state courts considered it." *Brown* v. *Estelle*, 701 F.2d 494, 495 (5th Cir. 1983) (per curiam). The leading case to ask this is *Demarest* v. *Price*, 130 F.3d 922 (10th Cir. 1997). There, the petitioner had alleged in State court that counsel had failed to challenge or cross-examine the prosecution's blood-spatter experts. *Id.* at 937. At a federal hearing, however, expert blood-spatter testimony for the defense "transformed" the petitioner's claim "from one involving only general allegations of failing to investigate and cross-examine and only a minimal showing of prejudice into one involving a concrete reference to a qualified expert who could have been produced at trial to rebut the scientific basis of the state's case." *Id.* at 938.

The Fifth Circuit has phrased the test as a materiality standard. *Kunkle* v. *Dretke*, 352 F.3d 980, 988 (5th Cir. 2003). But even under that standard, the Fifth Circuit has considered expert affidavits, not presented to State courts, supporting a claim that counsel had failed to investigate mental-health defenses. *Dowthitt* v. *Johnson*, 230 F.3d 733, 744–46 (5th Cir. 2000). The court asked whether the affidavits put the claim "in a significantly different and stronger evidentiary posture," but found that they "added little." *Id.* at 746 (internal quotation marks omitted).

The difference between a stronger-posture test and *Vasquez* is evident in *Conner* v. *Quarter-*

man, 477 F.3d 287 (5th Cir. 2007). There, the petitioner sought to use new medical records:

> Even if the medical records put Conner's claim in a "stronger evidentiary posture," *Anderson*, 338 F.3d at 388 (citing *Joyner* v. *King*, 786 F.2d 1317, 1320 (5th Cir. 1986)), the claim is exhausted because "the supplemental evidence . . . [does] not fundamentally alter the legal claim already considered by the state courts, and, therefore, [does] not require that [Conner] be remitted to state court for consideration of that evidence." *Vasquez*, 474 U.S. at 260.

477 F.3d at 292 (brackets & ellipsis in *Conner*).

In short, there is confusion over the test for factual exhaustion. This Court should dispel that confusion, and should do so with an eye to other habeas-procedure issues. In particular, "the 'exhaustion' and 'adjudicated on the merits' elements of federal habeas practice are mirror images." *Wilson* v. *Workman*, 577 F.3d 1284, 1292 (10th Cir. 2009) (en banc) (McConnell, J). Thus, if a court disposes of a claim without considering the facts that support it, the court has not decided the claim on its merits. *Id.* at 1290–91. That is why the Tenth Circuit recently held that if new facts generate a new claim in federal court, then AEDPA deference does not apply to that claim, and federal review of it is *de novo*. *Id.* at 1293; *cf. Bell* v. *Kelly*, *cert. granted*, 128 S. Ct. 2108 (2008), *cert. dismissed*, 129 S. Ct. 393 (2008).

II.

In Raising Procedural Defenses *Sua Sponte*, The Court of Appeals Acted Fundamentally Unfairly and Took Sides in Two Circuit Splits That This Court Should Resolve.

Even if Ms. Bason had a new claim, it should have been considered below, because the State expressly waived exhaustion. Yet the court of appeals raised two procedural defenses *sua sponte*, without giving Ms. Bason notice or an opportunity to be heard on them. In so doing, the Sixth Circuit departed so far from the usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Such an exercise, furthermore, would be doctrinally useful. Exhaustion and procedural default are "inseparab[le]," *Edwards* v. *Carpenter*, 529 U.S. 446, 452 (2000), but this Court has not yet resolved how they interact after a State has waived exhaustion under AEDPA.

A. Most Circuits Hold That Waiving Exhaustion Also Waives Any Exhaustion-Related Default.

The exhaustion rule is nonjurisdictional. *Day* v. *McDonough*, 547 U.S. 198, 205 (2006). So it need not apply if a State waives it expressly, through counsel. 28 U.S.C. § 2254(b)(3). Here, the State of Michigan did just that. When asked, "Have remedies been exhausted?" the State literally checked the "Yes" box. State Br. at ii (fact sheet); *see Baker* v. *Craven*, 82 F. App'x 423, 428

n.3 (6th Cir. 2003) (unpublished) (declining to address exhaustion after identical stipulation).

As for defaults, the Eleventh Circuit has explained that there are two types of procedurally defaulted claims: unexhausted claims that are time-barred under State law, and claims that have been argued before State courts and disposed of on procedural grounds. Accordingly, if a State waives exhaustion under § 2254(b)(3), the State also waives procedural default. *Smith* v. *Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1339–40 (11th Cir. 2009) (citing *McNair* v. *Campbell*, 416 F.3d 1291, 1306 (11th Cir. 2005)).

The First and Tenth Circuits agree with this analysis. *Pike* v. *Guarino*, 492 F.3d 61, 73 (1st Cir. 2007) ("[I]n expressly waiving the nonexhaustion defense, the Commonwealth lost the concomitant right, in the procedural default context, to assert that the claim was not presented to the state courts."); *see also Gonzalez* v. *McKune*, 279 F.3d 922, 924 (10th Cir. 2002) (en banc) (noting that the state did not waive procedural default, since it did not expressly waive nonexhaustion). In the Fifth Circuit, defaults caused by nonexhaustion are waived by an express waiver of nonexhaustion, *Bledsue* v. *Johnson*, 188 F.3d 250, 254–55 (5th Cir. 1999), but other defaults are not, *see Jackson* v. *Johnson*, 194 F.3d 641, 652 & n.35 (5th Cir. 1999); *see also Perruquet* v. *Briley*, 390 F.3d 505, 515–16 (7th Cir. 2004) (comparing cases).

Other courts, however, disagree. *Franklin* v. *Johnson*, 290 F.3d 1223, 1230 (9th Cir. 2002);

Robinson v. *Crist*, 278 F.3d 862, 865 (8th Cir. 2002) ("[A]n exhaustion concession does not necessarily constitute a procedural default waiver. . . .").

Here, without analyzing the matter, the Sixth Circuit took the minority view. Elsewhere, its position is unclear. *See Garner* v. *Mitchell*, 502 F.3d 394, 401 n.1 (6th Cir. 2007) (distinguishing waiver of default from waiver of exhaustion), *rev'd on other grounds*, *Garner* v. *Mitchell*, 557 F.3d 257, 260 (6th Cir. 2009) (en banc) (denying petitioner's claim on merits despite lack of exhaustion); *see also id.* at 271 (Daughtrey, J., concurring in result) (terming exhaustion-related default "dispositive").

Even if a court may raise default *sua sponte*, it would be highly improper to do so after a State expressly waives default. It is one thing for a court to act *sua sponte* in the face of silence; it is quite another for a court to invoke a defense that a State has expressly declined to deploy. *Cf. Day*, 547 U.S. at 202 ("[W]e would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense.").

B. Most Circuits Hold That Courts Should Not Invoke Procedural Defenses *Sua Sponte* Without Giving Petitioners Notice and an Opportunity To Be Heard.

Even where default exists, a petitioner is normally "under no obligation to address the default until the State raise[s] the issue. . . ." *Fairchild* v. *Workman*, 579 F.3d 1134, 1141 n.2 (10th Cir. 2009) (internal citation omitted). Here,

after waiving exhaustion, the State never argued default. Surely its experienced habeas counsel knew that default is "normally a defense that the State is obligated to raise and preserve if it is not to lose the right to assert the defense thereafter." *Trest* v. *Cain*, 522 U.S. 87, 89 (1997) (internal quotation marks, citation, and alterations omitted).

Default is not jurisdictional, so courts need not raise it *sua sponte*. *Id.* Whether courts *may* raise default *sua sponte* is a question that this Court has reserved. *Id.* at 90–91; *see also Day*, 547 U.S. at 206 & n.5. The courts of appeals generally hold that they do have this power. *Id.* at 206–07 (collecting cases).[5]

Sua sponte action, however, requires care. In the limitations context, this Court has warned, "[B]efore acting on its own initiative, a court must

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[5] The counterargument is that States may logically decide that federal questions should be litigated in federal courts; and that in the interests of comity and federalism, federal courts should respect sovereigns' decisions to proceed on the merits. *See Hills* v. *Washington*, 441 F.3d 1374, 1376–77 (11th Cir. 2006) (per curiam) (refusing to consider procedural default when the State defended only on the merits). Furthermore, equity between the parties suggests that States, like other litigants, should be held to their strategies. *See Rosario* v. *United States*, 164 F.3d 729, 733 (2d Cir. 1998) ("[P]risoners seeking habeas corpus relief lack the resources available to the government. We should hesitate to lend the weight of the judiciary to this already uneven fight."). Equal treatment of opposing parties would "observe[ ] the formalities of our adversary system, which is a nontrivial value in itself." *Day*, 547 U.S. at 216 n.2 (Scalia, J., dissenting).

accord the parties fair notice and an opportunity to present their positions. Further, the court must assure itself that the petitioner is not significantly prejudiced by the delayed focus" on the issue. *Day* 547 U.S. at 210; *see also id.* at 205 (analogizing statutes of limitations to both exhaustion and procedural default).

For these reasons, five circuits—including the Sixth—hold that it is inappropriate to raise default *sua sponte* if the petitioner has had no notice that default will be at issue, and no opportunity to be heard on the subject. *Prieto* v. *Quarterman*, 456 F.3d 511, 518–19 (5th Cir. 2006); *Howard* v. *Bouchard*, 405 F.3d 459, 476–77 (6th Cir. 2005); *Hale* v. *Gibson*, 227 F.3d 1298, 1334 n.16 (10th Cir. 2000); *Roach* v. *Angelone*, 176 F.3d 210, 215 n.3 (4th Cir. 1999); *Esslinger* v. *Davis*, 44 F.3d 1515, 1528 (11th Cir. 1995). "[F]or a court sua sponte to invoke a procedural default without giving the petitioner an opportunity to show cause" is "fundamentally unfair." *Esslinger*, 44 F.3d at 1528. As a matter of due process, a petitioner "must receive notice of the court's intention to interpose default, and opportunity to demonstrate 'cause' for the default and 'prejudice,' and, if material issues of fact are present, an opportunity to present . . . evidence." *Id.* at 1528 n.45.

There are circuits, however, that do not require notice and an opportunity to be heard before raising procedural default *sua sponte* and dismissing on that basis. In *Rosario* v. *United States*, 164 F.3d 729, 732–33 (2d Cir. 1998), the

Second Circuit raised procedural default *sua sponte* in a § 2255 case, without any briefing on the subject, and without addressing the fact that the petitioner had no opportunity to be heard on it.[6] In the AEDPA statute-of-limitations context, the Second Circuit similarly allows *sua sponte* dismissals, without opportunity to be heard, where the time bar is "unmistakably clear from the facts alleged in the petition." *Acosta* v. *Artuz*, 221 F.3d 117, 125 (2d Cir. 2000). The Seventh Circuit too seems not to have any notice rule. *See Kurzawa* v. *Jordan*, 146 F.3d 435, 440 (7th Cir. 1998) ("If the State does not explicitly or implicitly forego the waiver defense, we may make sua sponte inquiry into whether a procedural default is manifest.") (internal quotation marks and citation omitted). The *Kurzawa* court refused to consider arguments that it considered inadequately raised in State court, even though the district court considered exhaustion and then heard the case on the merits. *Kurzawa* is silent as to whether the circuit court received briefing or heard argument on notice and opportunity. *Id.* at 440–43 & n.5.

There was no briefing or argument here on default. The panel raised it *sua sponte*—despite having observed, in a case from the same sitting, that the Sixth Circuit "does not do so as a matter of

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[6] The Ninth Circuit has rejected the *Rosario* approach, at least in § 2255 cases. *United States* v. *Guess*, 203 F.3d 1143, 1146 n.2 (9th Cir. 2000) (citing *United States* v. *Barron*, 172 F.3d 1153 (9th Cir. 1999) (en banc)).

course." *Cristini* v. *McKee*, 526 F.3d 888, 898 (6th Cir. 2008) (internal quotation marks omitted).

C. If Ms. Bason Had Been Given Notice, She Could Have Made Three Points.

The fundamental unfairness of the result below is even more acute given that, one year after oral argument, Ms. Bason offered to provide the court of appeals "further briefing on any subject." Indeed, had the court below given notice, Ms. Bason could have countered any procedural defenses, which the State had expressly waived, with at least three arguments.

1. There Was No Default.

First, Ms. Bason could have argued that no aspect of her claim is defaulted. In *Wagner* v. *Smith*, 581 F.3d 410 (6th Cir. 2009), a Michigan prisoner made ineffective-assistance arguments on direct State appeal, and—like Ms. Bason—never made any State collateral attack. After finding that some federal arguments were unexhausted claims, the Sixth Circuit remanded the petition as mixed, and observed that under Michigan law, "there is no statutory time limit" on the first collateral attack. *Id.* at 419. Michigan courts may hear unexhausted claims if the petitioner shows cause and prejudice for not raising them on direct appeal. *Id.*

2. Any Default Should Be Excused Due to Cause and Prejudice.

Second, even if there were a default, Ms. Bason could have argued that it should be

excused. While this Court has "not identified . . . exactly what constitutes 'cause' to excuse a procedural default," it has acknowledged that "in certain circumstances counsel's ineffectiveness in failing to properly preserve the claim for review in state court will suffice." *Edwards* v. *Carpenter*, 529 U.S. 446, 451 (2000). Cause "may include . . . ineffective assistance of counsel—in the constitutional sense—on direct appeal." *Matchett* v. *Dretke*, 380 F.3d 844, 848–49 (5th Cir. 2004) (citing *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986)). Here, cause and prejudice are both present because Ms. Bason's State appellate counsel failed to raise Barnwell's failure to put the Van Horn report in.

3.. If Ms. Bason's Petition Were Mixed, Then Staying and Abeyance Would Be Proper.

Third, Ms. Bason could have sought to return to State court and exhaust the report issue, and have asked that meanwhile, her federal petition be stayed and held in abeyance. That very procedure is what this Court has approved in order to harmonize the total-exhaustion rule of *Rose* v. *Lundy*, 455 U.S. 509 (1982), with AEDPA's statute of limitations in a way that does not risk petitioners "forever losing their opportunity for any federal review of their unexhausted claims," *Rhines* v. *Weber*, 544 U.S. 269, 275 (2005). The *Rhines* procedure is "appropriate when the district court determines there was good cause for the petitioner's failure to exhaust." *Id.* at 277. It is not available if the unexhausted claims are "plainly

meritless," *id.*, or if the petitioner engages in "abusive litigation tactics or intentional delay," *id.* at 278. Importantly, good cause can include "reasonable confusion," at least as to the timeliness of a filing. *Pace* v. *DiGuglielmo*, 544 U.S. 408, 416 (2005); *see also Rhines*, 544 at 279 (Stevens, J., concurring) ("[G]ood cause . . . is not intended to impose the sort of strict and inflexible requirement that would trap the unwary pro se prisoner.") (internal quotation marks omitted).

Here, even if Ms. Bason's petition were mixed, it would be suited to staying and abeyance. The parties' agreement that Ms. Bason's claim was exhausted shows that she has proceeded reasonably. So too does the fact that the Sixth Circuit has often followed this Court's factual-exhaustion precedent of *Vasquez*. *See* Part I.A, *supra*. The "new" but transcript-based argument, from counsel's failure to put in the report, is meritorious. *See* Part III.A.2, *infra*. And Ms. Bason is serving a term of years. She has no incentive to delay. In such circumstances, other circuits have remanded claims for further consideration by district courts. *See, e.g.*, *Fairchild*, 579 F.3d at 1155.

III.

The Decision Below Is Incorrect.

Regardless of whether the Sixth Circuit was correct to ignore half of Ms. Bason's arguments, it still misjudged her appeal, for at least four reasons.

A. The State Court Unreasonably Applied Clearly Established Federal Law.

1. A Substantial-Defense Test Conflicts with *Strickland*.

The Michigan Court of Appeals held that Ms. Bason had not established that her "defenses were substantial such that they might have made a difference in the outcome of the trial." App. 38a. But the issue is whether the defendant "received a fair trial . . . resulting in a verdict worthy of confidence." *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995). That is why the *Strickland* prejudice test requires only a "reasonable probability" of a different trial result. *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984).

To use a substantial-defense test, therefore, is contrary to *Strickland*:

> The Michigan Court of Appeals' focus on whether the petitioner was deprived of a substantial defense borders on an outcome-determinative test specifically rejected by the Supreme Court in *Strickland*. . . . To require the petitioner to show counsel's performance deprived him of a defense to the charges borders on requiring him to show that the outcome . . . would have been different; such a result is contrary to Supreme Court precedent.

Smith v. *Lafler*, 175 F. App'x 1, 6 n.1 (6th Cir. 2006) (unpublished) (citation omitted).

2. To Be Strategic Under *Wiggins*, Counsel's Decision Must Not Rest on a Rotten Foundation.

To be a strategy, a choice must be a "conscious, reasonably informed decision made by an attorney with an eye to benefiting [the] client." *Pavel* v. *Hollins*, 261 F.3d 210, 218 (2d Cir. 2001); *see also id.* at 218 n.11 (collecting cases). By contrast, if a decision is not freely made, but rather is dictated by prior errors, then counsel is "not in a position to make a reasonable strategic choice." *Wiggins* v. *Smith*, 539 U.S. 510, 536 (2003).

Therefore, if counsel's mistake causes a defense theory to be abandoned, the abandonment is not strategy. *See Rolan* v. *Vaughn*, 445 F.3d 671, 682 (3d Cir. 2006) (failure to investigate); *United States* v. *Span*, 75 F.3d 1383, 1389–90 (9th Cir. 1996) (self-defense); *Chambers* v. *Armontrout*, 907 F.2d 825, 831 (8th Cir. 1990) (failure to investigate self-defense witness). If counsel, in an "oversight," fails to obtain an expert report, and can provide "no explanation that could justify" this, then counsel is ineffective. *Harris* v. *Cotton*, 365 F.3d 552, 555–56 (7th Cir. 2004). In the Sixth Circuit itself, if counsel flouts a rule requiring advance disclosure of a witness, counsel acts unprofessionally. *Stewart* v. *Wolfenbarger*, 468 F.3d 338, 355 (6th Cir. 2006). "[T]here is nothing reasonable about failing to file an alibi notice within the time prescribed by the applicable rules when such failure risks wholesale exclusion of the defense." *Clinkscale* v. *Carter*, 375 F.3d 430, 443 (6th Cir. 2004).

B. The State Court Unreasonably Determined the Facts.

1. There Was No Accident Theory.

The Michigan court's finding that Barnwell made a strategic decision to proceed on an accident theory is—as this Court described similarly self-serving testimony—"more a post hoc rationalization of counsel's conduct than an accurate description of [her] deliberations. . . ." *Wiggins*, 539 U.S. at 526–27. Indeed, the word "accident" never appeared in Barnwell's opening or closing statement. Rather, the thrust of the opening statement was that Ms. Bason had defenses to offer: provocation, self-defense, or mental illness. The gist of the terse closing statement was that the prosecution had failed to meet its burden of proof.

Barnwell's post-hoc testimony was equally troubling. She rationalized, "It had to have been an accident because she loved him very much." JA 1229. But a battered woman can be a loving wife. *See generally People* v. *Wilson*, 487 N.W.2d 822, 824 (Mich. App. 1992) (discussing loving behaviors between batterers and women). And a heat-of-passion defense is strengthened, not undercut, by the killer's passion for the victim. *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 15.2(b) (2d ed. 2009) (including adultery among provocations that have "traditionally been considered, almost as a matter of law, to be reasonable"); *accord* 4 WILLIAM BLACKSTONE, COMMENTARIES *191–92 ("[T]here could not be a greater provocation.").

2. There Was No Cooling-Off Time.

Indeed, what sparked the crash here was not Mr. Branch's earlier phone call to another woman. Rather, as a prosecutor said, it was that Ms. Bason "caught [her husband] on the block of his girlfriend." Indeed, with each step that her husband took toward the place where he would meet Wynter White, Ms. Bason's heat of passion increased. What spouse would remain emotionally unexcited as the beloved walks to an adulterous rendezvous?

CONCLUSION

Lanise Bason's petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 5, 2009

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 05-2200

LANISE BASON,

Petitioner-Appellant,

—v.—

JOAN YUKINS, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: DAUGHTREY and MCKEAGUE, Circuit Judges; and GWIN,* District Judge.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original sub-

* Hon. James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

mission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 05-2200

File Name: 09A0324N.06
Filed: May 12, 2009

LANISE BASON,

Petitioner-Appellant,

—v.—

JOAN YUKINS,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

Before: DAUGHTREY and MCKEAGUE, Circuit Judges; GWIN,* District Judge.

PER CURIAM. Petitioner Lanise Bason appeals the denial of her petition for habeas corpus relief from her Michigan prison sentence of 18-50 years for the second-degree murder of her husband, Bryant Branch. The district court granted Bason a certifi-

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* The Hon. James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

cate of appealability "as to Petitioner's ineffective assistance of counsel claim," and Bason now identifies four components of that claim: (1) "by failing to follow procedural rules, trial counsel caused the critical expert report to be excluded"; (2) "counsel 'forgot' to test the prosecution's case by moving for a directed verdict"; (3) "trial counsel failed to put on a case for the defense"; and (4) "trial counsel also failed to present important mitigating evidence at sentencing." *See* Appellant's Br. at iii.

However, Bason raised only the second and third issues before the Michigan state appellate courts. Indeed, the first and fourth claims listed in Bason's appellate brief were never advanced before the Michigan appellate courts, were not argued before the district judge, and were not even mentioned in the district court's opinion denying habeas relief, despite a passing reference in Bason's amended petition to the ineffectiveness of counsel at sentencing by failing to offer the testimony of an expert witness knowledgeable in the diagnosis of "battered spouse syndrome." Because Bason did not fairly present these issues to the Michigan state courts, and because she no longer has the opportunity to do so, *see* M.C.R. § 6.508(D)(3), they are considered procedurally defaulted, *see Engle* v. *Isaac*, 456 U.S. 107, 125 n.28 (1982); *Williams* v. *Anderson*, 460 F.3d 789, 806 (6th Cir. 2006); *Martin* v. *Mitchell*, 280 F.3d 594, 603 (6th Cir. 2002). Bason has failed to demonstrate cause and actual prejudice or a fundamental miscarriage of justice to overcome the procedural default. *See Coleman* v. *Thompson*, 501 U.S. 722, 750 (1991). Even assuming no procedural default, Bason's failure to raise these issues before the district court further counsels against appellate review

by this court. *See Foster* v. *Barlow*, 6 F.3d 405, 407 (6th Cir. 1993). Accordingly, we decline to consider the merits of the first and fourth ineffective-assistance-of-counsel claims presented by the petitioner.

Moreover, the opinion of the district judge denying habeas relief to Bason thoroughly analyzes the two ineffective-assistance-of-counsel claims that were properly presented to the Michigan state courts. Having had the benefit of oral argument, and having carefully considered the record on appeal and the briefs of the parties, we are not persuaded that the district judge erred in denying the habeas corpus petition. The reasons justifying such a denial have been ably articulated by the district court, and the issuance of a full written opinion by this court would be duplicative and serve no useful, jurisprudential purpose. Accordingly, we AFFIRM the judgment of the district court regarding Bason's exhausted claims upon the reasoning set out by that court in its opinion and order filed on June 28, 2005.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL CASE NO. 04-CV-71575-DT
HONORABLE GERALD E. ROSEN

LANISE BASON, #319076,
Petitioner,

—v.—

JOAN YUKINS,
Respondent.

ORDER GRANTING IN PART AND DENYING IN PART A CERTIFICATE OF APPEALABILITY AND GRANTING LEAVE TO PROCEED ON APPEAL *IN FORMA PAUPERIS*

Petitioner has filed a notice of appeal and an application to proceed on appeal *in forma pauperis* concerning the Court's denial of her petition for a writ of habeas corpus under 28 U.S.C. § 2254. Before Petitioner may appeal this Court's dispositive decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c)(1)(a); Fed. R. App. P. 22(b). The Court must either issue a certificate of appealability

indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); Fed. R. App. P. 22(b); *In re Certificates of Appealability*, 106 F.2d 1306, 1307 (6th Cir. 1997).

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a federal district court rejects a habeas claim on the merits, the substantial showing threshold is met if the petitioner demonstrates that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). "A petitioner satisfies this standard by demonstrating that . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In applying this standard, a district court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of the petitioner's claims. *Id* at 336-37.

When a federal district court denies a habeas claim on procedural grounds without addressing the claim's merits, a certificate of appealability should issue if it is shown that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *See Slack*, 529 U.S. at 484-85.

Having reviewed the matter, the Court concludes that Petitioner has failed to make a substantial showing of the denial of a constitutional right as to

her sentencing proportionality claim. *See Harmelin v. Michigan*, 501 U.S. 957, 965 (1991); *Austin v. Jackson*, 231 F.3d 298, 300 (6th Cir. 2000). The Court further concludes, however, that Petitioner has made a substantial showing of the denial of a constitutional right as to her ineffective assistance of counsel claim. *See Strickland v. Washington*, 466 U.S. 668 (1984). While the Court continues to believe that the ineffective assistance claim does not warrant habeas relief, it nonetheless finds that the claim merits further review by the United States Court of Appeals for the Sixth Circuit.

Accordingly, the Court **GRANTS** a certificate of appealability as to Petitioner's ineffective assistance of counsel claim, but **DENIES** a certificate of appealability as to her sentencing claim. Given this determination, the Court **GRANTS** Petitioner's application to proceed *in forma pauperis* on appeal. *See* Fed. R. App. P. 24(a).

IT IS SO ORDERED.

s/ GERALD E. ROSEN
Gerald E. Rosen
United States District Judge

Dated: August 10, 2005

I hereby certify that a copy of the foregoing document was served upon counsel of record on August 10, 2005, by electronic and/or ordinary mail.

s/ LASHAWN R. SAULSBERRY
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL CASE NO. 04-CV-71575-DT
HONORABLE GERALD E. ROSEN

LANISE BASON, #319076,
Petitioner,

—v.—

JOAN YUKINS,
Respondent.

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

I. Introduction

Petitioner Lanise Bason, a state prisoner presently confined at the Scott Correctional Facility in Plymouth, Michigan, has filed a *pro se* petition for writ of habeas corpus under 28 U.S.C. § 2254. Petitioner challenges her second-degree murder which was imposed following a bench trial in the Wayne County Circuit Court in 2000. Petitioner was sentenced to 18 to 50 years imprisonment. In her pleadings, peti-

tioner challenges the effectiveness of trial counsel and the proportionality of her sentence. For the reasons stated below, the petition for writ of habeas corpus is denied.

II. Facts and Procedural History

Petitioner's conviction stems from the death of her husband Bryant Branch in Detroit, Michigan on February 23, 1999. The testimony at trial revealed that Petitioner drove her car over a berm and struck Branch while he was walking on a neighborhood sidewalk, causing his death. She then crashed her car into a nearby tree, causing injury to herself. Police testimony established that the car was going 40 to 50 miles per hour when it struck Branch. The car left tracks over three or four lawns in a straight line from the street for approximately 100 feet. Civilian witnesses, including Branch's family members and mistress, testified that Petitioner and Branch had fought and argued on prior occasions, were separated, and were getting a divorce. Those witnesses also recalled that Petitioner had threatened to kill Branch and had said that if she could not have him, no one could.

During trial, the court conducted an evidentiary hearing to determine the admissibility of Petitioner's post-accident statement to police. At the conclusion of that hearing, the court found that Petitioner was heavily medicated when she spoke to police and suppressed her statement. The prosecution rested its case.

After consulting with Petitioner, defense counsel also rested and did not present any witnesses. Defense counsel argued that the death was accidental and that the prosecution failed to establish

the elements of second-degree murder beyond a reasonable doubt. The trial court convicted Petitioner of second-degree murder, finding no evidence of emotional excitement which could reduce the crime to voluntary manslaughter.

Following her conviction, Petitioner, through counsel, filed a motion with the trial court to amend findings or make additional findings concerning the charges of voluntary and involuntary manslaughter. The trial court decided to conduct an evidentiary hearing on possible proofs, but during the course of that hearing decided that an evidentiary hearing on counsel's effectiveness would be more appropriate to determine whether a new trial was warranted.

The trial court subsequently sentenced Petitioner within the state sentencing guidelines to a term of 18 to 50 years imprisonment.

The trial court then conducted the evidentiary hearing on the effectiveness of counsel. At that hearing, trial counsel testified that she investigated several defenses prior to trial, including diminished capacity, heat of passion, and battered woman's syndrome. Counsel explained that the diminished capacity was not supported by the facts and would not have been a defense to the general intent crime of second-degree murder. She did not think that a heat of passion defense would be successful because there was no documented abuse by Branch on the day of the incident, Petitioner had invited Branch to her home that day, and he had treated her well. She did not pursue the battered woman defense because she could find no police reports of abusive activity and the witnesses stated that they saw mutual fights between the parties.

Counsel further testified that she chose not to present additional testimony based upon her reading of the trial judge, and because she did not want damaging evidence to be admitted in rebuttal and she thought that the prosecution had not sustained its burden of proof for second-degree murder. She also believed Petitioner's statements indicating that the crash was an accident—that Petitioner was upset and only intended to confront Branch, but lost control of her car and struck him. At the close of the hearing, the trial court concluded that counsel was not ineffective and declined to grant a new trial.

Petitioner, through counsel, then filed an appeal with the Michigan Court of Appeals, asserting that trial counsel was ineffective and her sentence was disproportionate. The Michigan Court of Appeals affirmed Petitioner's conviction and sentence. *People v. Bason*, No. 230157, 2002 WL 31012614 (Mich. Ct. App. Aug. 30, 2002) (unpublished). Petitioner filed an application for leave to appeal with the Michigan Supreme Court raising the same issues, which was denied because the court was "not persuaded that the questions presented should be reviewed." *People v. Bason*, 468 Mich. 905, 661 N.W.2d 581 (2003).

Petitioner filed her initial petition for writ of habeas corpus on April 27, 2004. She subsequently filed an amended petition, asserting the following claims as grounds for relief:

I. She is entitled to a new trial where she had ineffective assistance of counsel.

II. The sentence imposed is disproportionate under *People v. Milbourn*, 435 Mich. 630 (1990), given the nature of the crime and the sentence imposed.

Respondent has filed an answer to the amended petition, asserting that it should be denied for lack of merit. Petitioner has filed a reply to that answer.

III. Standard of Review

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. § 2241 *et seq.*, govern this case because Petitioner filed her habeas petition after the AEDPA's effective date. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). The AEDPA provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d) (1996).

"A state court's decision is 'contrary to' . . . clearly established law if it 'applies a rule that contradicts the governing law set forth in [Supreme Court cases]' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result

different from [this] precedent.'" *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003) (per curiam) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)); *see also Bell v. Cone*, 535 U.S. 685, 694 (2002). "[T]he 'unreasonable application' prong of § 2254(d)(1) permits a federal habeas court to 'grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court but unreasonably applies that principle to the facts' of petitioner's case." *Wiggins v. Smith*, 539 U.S. 510, 520 (2003) (quoting *Williams*, 529 U.S. at 413); *see also Bell*, 535 U.S. at 694. However, "[i]n order for a federal court find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous. The state court's application must have been 'objectively unreasonable.' *Wiggins*, 539 U.S. at 520-21 (citations omitted); *see also Williams*, 529 U.S. at 409.

Section 2254(d)(1) limits a federal habeas court's review to a determination of whether the state court's decision comports with clearly established federal law as determined by the Supreme Court at the time the state court renders its decision. *See Williams*, 529 U.S. at 412; *see also Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). Section 2254(d) "does not require citation of [Supreme Court] cases—indeed, it does not even require *awareness* of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002); *see also Mitchell*, 540 U.S. at 16. While the requirements of "clearly established law" are to be determined solely by the holdings of the Supreme Court, the decisions of lower federal courts are useful in

assessing the reasonableness of the state court's resolution of an issue. *See Williams v. Bowersox*, 340 F.3d 667, 671 (8th Cir. 2003); *Dickens v. Jones*, 203 F. Supp. 354, 359 (E.D. Mich. 2002).

Lastly, § 2254(e)(1) requires that this Court presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(1). A habeas petitioner may rebut this presumption only with clear and convincing evidence. *Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998).

IV. Analysis

A. *Ineffective Assistance of Trial Counsel Claim*

Petitioner first asserts that she is entitled to habeas relief because trial counsel was ineffective for failing to present a viable defense to the second-degree murder charge. Respondent contends that this claim lacks merit.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court set forth a two-pronged test for determining whether a habeas petitioner has received the ineffective assistance of counsel. First, a petitioner must prove that counsel's performance was deficient. This requires a showing that counsel made errors so serious that he or she was not functioning as counsel as guaranteed by the Sixth Amendment. 466 U.S. at 687. Second, the petitioner must establish that the deficient performance prejudiced the defense. Counsel's errors must have been so serious that they deprived the petitioner of a fair trial or appeal. *Id.*

With respect to the performance prong, a petitioner must identify acts that were "outside the wide

range of professionally competent assistance" in order to prove deficient performance. *Id.* at 690. The reviewing court's scrutiny of counsel's performance is highly deferential. *Id.* At 689. The court must recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690.

To satisfy the prejudice prong under *Strickland*, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id.* "On balance, the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result." *McQueen v. Scroggy*, 99 F.3d 1302, 1311-12 (6th Cir. 1996) (quoting *Strickland*, 466 U.S. at 686).

In this case, the Michigan Court of Appeals determined that Petitioner was not denied the effective assistance of counsel at trial under the standard set forth in *Strickland*, *supra*. The court reasoned as follows:

> Defendant first claims that she was denied the effective assistance of counsel. To establish a claim of ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prej-

udice, a defendant must " 'show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v Johnson*, 451 Mich 115, 122; 545 NW2d 637 (1996), quoting *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995), quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 LEd2d 674 1984). A defendant must also overcome the strong presumption that the challenged action is sound trial strategy. *In re Ayres*, 239 Mich App 8, 21; 608 NW2d 132 (1999).

Defendant contends that counsel's failure to present any defense on her behalf, where there was evidence to support a heat of passion, battered wife syndrome, or diminished capacity theory, amounted to ineffective assistance of counsel. We disagree. Following the prosecution's case in chief, the trial court conducted a *Walker* hearing and suppressed the statement that defendant made to the police on the basis that defendant did not make the statement voluntarily because she was highly medicated when she spoke with the police. The statement included possible evidence that could be damaging to defendant regarding premeditation. Thereafter, defense counsel rested without presenting any witnesses on her behalf. At the *Ginther* hearing, defense counsel testified that she rested because she believed that the prosecution failed to prove second-degree murder and that defendant would prevail on a theory of accident. Defendant did not testify at the *Ginther* hearing.

"A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *Ayres*, *supra* at 22. A counsel's failure to raise a substantive defense where there is substantial evidence to support the defense may amount to ineffective assistance of counsel. *People v. Moore*, 131 Mich App 416, 418; 345 NW2d 710 (1984). "Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial." *Ayres*, *supra*. A substantial defense is one that "might have made a difference in the outcome of the trial." *Id.* However, "[t]his Court is reluctant to substitute its judgment for that of trial counsel in matters of trial strategy, and ineffective assistance of counsel will not be found merely because a strategy backfires." *Id.*

First, defendant has not shown that she made a good-faith effort to avail herself of the right to present these defenses. Although the record indicates that defendant initially asserted her right to these particular defenses, the record also indicates that she acquiesced in defense counsel's decision to pursue a defense theory of accident. Therefore, defendant's claim of ineffective assistance of counsel fails in this respect. Furthermore, defendant failed to demonstrate that a defense theory of diminished capacity, battered wife syndrome, or heat of passion was a "substantial defense" in that they may have affected the outcome of the trial. *Ayres*, *supra*.

First, although a psychologist who testified at the *Walker* hearing concluded that defendant suffered from a diminished capacity at the time of the accident and was not criminally responsible, defense counsel properly concluded that a diminished capacity defense was implausible in this case. A defense of diminished capacity is not a defense to second-degree murder, a general intent crime. *People v Biggs*, 202 Mich App 450, 454; 509 NW2d 803 (1993). Thus, because diminished capacity is not a defense to second-degree murder, defendant was not denied the effective assistance of counsel by defense counsel's failure to assert this defense.

Defendant also failed to show that a theory that she acted in self-defense because she suffered from the battered spouse syndrome may have made a difference in the outcome of the trial. *Ayres, supra*. Expert testimony on the battered spouse syndrome is generally offered by a defendant in a homicide case when the - defendant claims self-defense. *People v Christel*, 449 Mich 578, 589; 537 NW2d 194 (1995). The Court, recognizing that testimony regarding the battered spouse syndrome has been used "to explain the reasonableness of the battered spouse's perception that danger or great bodily harm is imminent," has permitted the introduction of battered spouse syndrome evidence to support a claim of self-defense. *People v Wilson*, 194 Mich App 599, 602-604; 487 NW2d 822 (1992). "[A] homicide is justified under the theory of self-defense if the defendant 'honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious

bodily harm." *Id.* at 602, quoting *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990).

To admit expert testimony regarding the battered spouse syndrome, there must be a factual premise allowing a reasonable trier of fact to infer that the defendant could be a battered spouse. *Christel*, *supra* at 592-593 n 27. While there may have been evidence of physical fights with Bryant in the past, the existing record does not establish that defendant honestly or reasonably believed she was in imminent danger of death or great bodily harm sufficient to establish a claim of self-defense. Nothing in the record shows that defendant killed Bryant because she feared for her life or that her state of mind was so affected by systematic and continual spousal abuse characteristic of the battered spouse syndrome that she feared some imminent harm by Bryant. To the contrary, trial testimony indicated that before the killing, defendant had on many occasions sought out Bryant, was violent toward him, threatened him, and repeatedly said that she was going to kill him. Significantly, on the night before the killing, defendant contacted Bryant. He came to her house, treated her well, and did not abuse her. Moreover, a review of the record indicates that the alleged abuse did not provoke defendant. Rather, the provocation stemmed from a phone call defendant made to another woman on the morning of the killing.

In sum, we conclude that the requisite factual premise did not exist to allow a reasonable trier of fact to infer that defendant feared Bryant.

Expert testimony regarding the battered spouse syndrome would not have been relevant because the facts do not suggest that defendant killed Bryant in self-defense. Therefore, testimony about the syndrome would not have affected the outcome of the trial even if offered by defense counsel. Thus, defendant failed to demonstrate that she was denied the effective assistance of counsel on this ground. *Ayres*, *supra*.

In addition, defendant failed to demonstrate that the outcome of the trial may have differed had defense counsel pursued a "heat of passion" theory. *Id.* The elements of voluntary manslaughter are: "(1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions." MCL 750.321; *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998), aff'd 461 Mich 992 (2000). The trial judge, sitting as the finder of fact, found that the facts did not justify mitigating murder to manslaughter.

The provocation necessary to mitigate murder to manslaughter is that which would cause a reasonable person to lose control and act out of passion rather than reason. *Sullivan*, *supra* at 518. The determination of what is adequate provocation is a question of fact for the trier of fact. *Id.* The trial judge found that the emotional excitement had been going on for a long time, there were arguments back and forth, and Wynter and defendant had been talking on the phone for some time, and concluded that she had "no

idea what had happened just prior to the time that the defendant put her foot on that gas and revved that car up." Evidently, the court found the record devoid of evidence regarding adequate provocation.

There were no witnesses other than defendant who could testify regarding what occurred before the killing. In concluding that the facts did not warrant a finding of manslaughter, the court emphasized that the couple had been arguing for quite some time and that defendant knew of Bryant's relationship with Wynter. Nothing in the record indicates that anything, other than the same situation she had been coping with for a lengthy period, compelled defendant to go in search of Bryant.

Furthermore, the trial court concluded that, even if they had an argument before defendant hit Bryant, sufficient time had passed to constitute a "cooling off" period during which time a reasonable person could control her passions. Throughout the sequence of events, defendant had time to take a second look before she acted. Trial evidence indicated that Wynter received a voice mail message from Bryant around 9:00 or 10:00 a.m. Thereafter, Bryant walked down the street on the sidewalk toward the house where Wynter was staying, which happened to be a house in the vicinity of defendant's home. As Bryant was walking on the sidewalk, defendant's vehicle jumped the curb and hit Bryant at approximately 10:30 a.m. In sum, we find that defendant failed to demonstrate that the out-

come of the trial may have differed had defense counsel pursued a "heat of passion" theory.

Defendant also contends that defense counsel's failure to move for a directed verdict constitutes ineffective assistance of counsel. In deciding whether to grant a motion for a directed verdict, the court must evaluate the evidence in the light most favorable to the prosecution. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). Defendant was not prejudiced by defense counsel's failure to move for a directed verdict because the court, at the *Ginther* hearing, indicated that a motion for a directed verdict would not have affected the outcome of the trial, because there was "entirely too much evidence for a . . . directed verdict."

Given the compelling evidence against defendant in this case, defense counsel was faced with a choice among several weak defenses. The record indicates that defense counsel acted diligently in this case. She interviewed possible witnesses, communicated with defendant on a regular basis, and investigated the plausible defense theories. At the *Ginther* hearing, defense counsel explained that she considered several defenses. When she rested, she thought that she had won on the theory of accident and that the prosecution had failed to prove its case as to second-degree murder. She also testified that based on the evidence and the judge's comments in chambers, that the judge did not believe any of the prosecution witnesses. Hence, she was certain she should rest at that time. Her explanations indicate that counsel

> made a strategic decision to proceed on an accident theory and not to pursue the alternate theories. The fact that defense counsel's strategy did not work does not render its use ineffective assistance of counsel. *Ayres*, *supra*. Although defense counsel testified that she should have taken a break before she rested, this Court does not assess counsel's performance with the benefit of hindsight. *People v Rice* (On Remand), 235 Mich App 429, 445; 597 NW2d 843 (1999).
>
> Although there may have been evidence to support alternate defenses, we find that defendant failed to assert her right to such defenses or establish that those defenses were substantial such that they might have made a difference in the outcome of the trial. *Ayres*, *supra*. Therefore, defense counsel's performance did not fall below an objective standard of reasonableness. *Pickens*, *supra* at 303.

Bason, 2002 WL 31012614 at *1-4.

Having reviewed the matter, this Court concludes that the Michigan Court of Appeals' decision is neither contrary to *Strickland* nor an unreasonable application of federal law or the facts. "Decisions as to what evidence to present and whether to call or question witnesses are presumed to be a matter of trial strategy, and the failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." *Chegwidden* v. *Kapture*, 92 Fed. Appx. 309, 311 (6th Cir. 2004).

The record before this Court indicates that trial counsel investigated several defenses, including

diminished capacity, heat of passion, and battered woman's syndrome, prior to trial. Trial counsel investigated the case, reviewed the potential evidence, and elected to proceed with an accident defense. At the close of the prosecution's proofs, counsel believed that the prosecution had not sustained its burden of proving that Petitioner was guilty of second-degree murder. After consulting with Petitioner, she rested her case. Given the nature of the evidence against Petitioner and the limited defenses available to her, the Court cannot conclude that trial counsel's conduct fell below that of a reasonably competent attorney. Counsel reasonably decided to argue an accident defense and reasonably decided to forego calling additional witnesses at trial as no other witnesses could have offered testimony in support of that defense. The fact that counsel's strategy was ultimately unsuccessful does not mean that counsel was ineffective. *See, e.g.*, *Moss v. Hofbauer*, 286 F.3d 851, 859 (6th Cir. 2002) (an ineffective assistance of counsel claim "cannot survive so long as the decisions of a defendant's trial counsel were reasonable, even if mistaken").

Furthermore, as discussed by the Michigan Court of Appeals, Petitioner has not demonstrated that she was prejudiced by trial counsel's conduct under the standard set forth in *Strickland*, *supra*. Simply stated, she has not shown that the other possible defenses were substantial or that any of those defenses would have altered the outcome at trial. Petitioner is thus not entitled to habeas relief on her ineffective assistance of trial counsel claim.

B. *Sentencing Claim*

Petitioner also claims that she is entitled to habeas relief because her sentence violates the principle of proportionality. To the extent that Petitioner asserts that her sentence is disproportionate under state law, *see People v. Milbourn*, 435 Mich. 630, 636, 461 N.W.2d 1 (1990) (a criminal sentence must be proportionate to both the offense and the offender), she fails to state a claim for federal habeas relief. *See Austin v. Jackson*, 231 F.3d 298, 300 (6th Cir. 2000) (citing *Pulley v. Harris*, 465 U.S. 37, 41(1984)); *Atkins v. Overton*, 843 F. Supp. 258, 260 (E.D. Mich. 1994). Moreover, Petitioner has no state-created interest in having the Michigan Sentencing Guidelines applied rigidly in determining her sentence. *Thomas v. Foltz*, 654 F. Supp. 105, 106-07 (E.D. Mich. 1987).

Petitioner is also not entitled to habeas relief on any claim that her sentence constitutes cruel and unusual punishment under the Eighth Amendment. The United States Constitution does not require strict proportionality between a crime and its punishment. *See Harmelin v. Michigan*, 501 U.S. 957, 965 (1991); *United States v. Marks*, 209 F.3d 577, 583 (6th Cir. 2000). "Consequently, only an extreme disparity between crime and sentence offends the Eighth Amendment." *Marks*, 209 F.3d at 583. A sentence that falls within the maximum penalty authorized by statute "generally does not constitute 'cruel and unusual punishment.' " *Austin*, 213 F.3d at 302 (quoting *United States v. Organek*, 65 F.3d 60, 62 (6th Cir. 1995)). "Federal courts will not engage in a proportionality analysis except in cases where the penalty imposed is death or life in prison without

possibility of parole." *United States v. Thomas*, 49 F.3d 253, 261 (6th Cir. 1995).

Petitioner was sentenced to a term of 18 to 50 years imprisonment on her second-degree murder conviction. As noted by the Michigan Court of Appeals, this sentence was within the sentencing guideline range, *see Bason*, 2002 WL 31012614 at *4, as well as the statutory maximum. *See* Mich. Comp. Laws § 750.317. Accordingly, this Court concludes that the trial court acted within its discretion in imposing Petitioner's sentence and there is no extreme disparity between her crime and sentence so as to offend the Eighth Amendment. Habeas relief is not warranted on this claim.

V. Conclusion

For the reasons stated, this Court concludes that Petitioner is not entitled to federal habeas relief on the claims presented.

Accordingly,

IT IS ORDERED that the petition for writ of habeas corpus is **DENIED** and **DISMISSED WITH PREJUDICE**.

s/ GERALD E. ROSEN
Gerald E. Rosen
United States District Judge

Dated: June 28, 2005

I hereby certify that a copy of the foregoing document was served upon counsel of record on June 28, 2005, by electronic and/or ordinary mail.

s/ LASHAWN R. SAULSBERRY
Case Manager

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

SC: 122324
COA: 230157
Wayne CC: 99-003035
Order Entered: May 15, 2003

MAURA D. CORRIGAN,
Chief Justice

MICHAEL F. CAVANAGH
ELIZABETH A. WEAVER
MARILYN KELLY
CLIFFORD W. TAYLOR
ROBERT P. YOUNG, JR.
STEPHEN J. MARKMAN,
Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

—v.—

LANISE BASON,

Defendant-Appellant.

On order of the Court, the application for leave to appeal the August 30, 2002 judgment of the Court of Appeals is considered, and it is DENIED because we are not persuaded that the questions presented should be reviewed by this Court.

Kelly, J., would remand to the Wayne Circuit Court for a further hearing concerning whether the defendant was denied effective assistance of counsel. *People v Ginther*, 390 Mich 436 (1973).

P0508
[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 15, 2003 Inger Z. Meyer
Clerk

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
August 30, 2002

No. 230157

Wayne Circuit Court
LC No. 99-003035

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

—v.—

LANISE BASON,

Defendant-Appellant.

Before: Cooper, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals by right her bench trial conviction for second-degree murder, MCL 750.317. Defendant was sentenced to a term of eighteen to fifty years' imprisonment. We affirm.

Defendant first claims that she was denied the effective assistance of counsel. To establish a claim of ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, a defendant must " 'show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v Johnson*, 451 Mich 115, 122; 545 NW2d 637 (1996), quoting *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995), quoting *Strickland* v *Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 1984). A defendant must also overcome the strong presumption that the challenged action is sound trial strategy. *In re Ayres*, 239 Mich App 8, 21; 608 NW2d 132 (1999).

Defendant contends that counsel's failure to present any defense on her behalf where there was evidence to support a heat of passion, battered wife syndrome, or diminished capacity theory, amounted to ineffective assistance of counsel. We disagree. Following the prosecution's case in chief, the trial court conducted a *Walker*[1] hearing and suppressed the statement that defendant made to the police on the basis that defendant did not make the statement voluntarily because she was highly medicated when she spoke with the police. The statement included possible evidence that could be damaging to defendant regarding premeditation. Thereafter, defense counsel rested without presenting any witnesses on

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[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

her behalf At the *Ginther*[2] hearing, defense counsel testified that she rested because she believed that the prosecution failed to prove second-degree murder and that defendant would prevail on a theory of accident. Defendant did not testify at the *Ginther* hearing.

"A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *Ayres*, *supra* at 22. A counsel's failure to raise a substantive defense where there is substantial evidence to support the defense may amount to ineffective assistance of counsel. *People v Moore*, 131 Mich App 416,418; 345 NW2d 710 (1984). "Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial." *Ayres*, *supra*. A substantial defense is one that "might have made a difference in the outcome of the trial." *Id*. However, "[t]his Court is reluctant to substitute its judgment for that of trial counsel in matters of trial strategy, and ineffective assistance of counsel will not be found merely because a strategy backfires." *Id*.

First, defendant has not shown that she made a good-faith effort to avail herself of the right to present these defenses. Although the record indicates that defendant initially asserted her right to these particular defenses, the record also indicates that she acquiesced in defense counsel's decision to pursue a defense theory of accident Therefore, defendant's claim of ineffective assistance of counsel fails

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[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

in this respect. Furthermore, defendant failed to demonstrate that a defense theory of diminished capacity, battered wife syndrome, or heat of passion was a "substantial defense" in that they may have affected the outcome of the trial. *Ayres*, *supra*.

First, although a psychologist who testified at the *Walker* hearing concluded that defendant suffered from a diminished capacity at the time of the accident and was not criminally responsible, defense counsel properly concluded that a diminished capacity defense was implausible in this case. A defense of diminished capacity is not a defense to second-degree murder, a general intent crime. *People v Biggs*, 202 Mich App 450, 454; 509 NW2d 803 (1993). Thus, because diminished capacity is not a defense to second-degree murder, defendant was not denied the effective assistance of counsel by defense counsel's failure to assert this defense.

Defendant also failed to show that a theory that she acted in self-defense because she suffered from the battered spouse syndrome may have made a difference in the outcome of the trial. *Ayres*, *supra*. Expert testimony on the battered spouse syndrome is generally offered by a defendant in a homicide case when the defendant claims self-defense. *People v Christel*, 449 Mich 578, 589; 537 NW2d 194 (1995). The Court, recognizing that testimony regarding the battered spouse syndrome has been used "to explain the reasonableness of the battered spouse's perception that danger or great bodily harm is imminent," has permitted the introduction of battered spouse syndrome evidence to support a claim of self-defense. *People v Wilson*, 194 Mich App 599, 602-604; 487 NW2d 822 (1992). "[A] homicide is justified under the theory of self-defense if the defen-

dant 'honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *Id.* at 602, quoting *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990).

To admit expert testimony regarding the battered spouse syndrome, there must be a factual premise allowing a reasonable trier of fact to infer that the defendant could be a battered spouse. *Christel*, *supra* at 592-593 n 27. While there may have been evidence of physical fights with Bryant in the past, the existing record does not establish that defendant honestly or reasonably believed she was in imminent danger of death or great bodily harm sufficient to establish a claim of self-defense. Nothing in the record shows that defendant killed Bryant because she feared for her life or that her state of mind was so affected by systematic and continual spousal abuse characteristic of the battered spouse syndrome that she feared some imminent harm by Bryant. To the contrary, trial testimony indicated that before the killing, defendant had on many occasions sought out Bryant, was violent toward him, threatened him, and repeatedly said that she was going to kill him. Significantly, on the night before the killing, defendant contacted Bryant. He came to her house, treated her well, and did not abuse her. Moreover, a review of the record indicates that the alleged abuse did not provoke defendant. Rather, the provocation stemmed from a phone call defendant made to another woman on the morning of the killing.

In sum, we conclude that the requisite factual premise did not exist to allow a reasonable trier of fact to infer that defendant feared Bryant. Expert testimony regarding the battered spouse syndrome

would not have been relevant because the facts do not suggest that defendant killed Bryant in self-defense. Therefore, testimony about the syndrome would not have affected the outcome of the trial even if offered by defense counsel. Thus, defendant failed to demonstrate that she was denied the effective assistance of counsel on this ground. *Ayres*, *supra*.

In addition, defendant failed to demonstrate that the outcome of the trial may have differed had defense counsel pursued a "heat of passion" theory. *Id.* The elements of voluntary manslaughter are: "(1) the defendant must kill in the heat of passion, (2) the passion must be caused by an adequate provocation, and (3) there cannot be a lapse of time during which a reasonable person could control his passions." MCL 750.321; *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998), aff'd 461 Mich 992 (2000). The trial judge, sitting as the finder of fact, found that the facts did not justify mitigating murder to manslaughter.

The provocation necessary to mitigate murder to manslaughter is that which would cause a reasonable person to lose control and act out of passion rather than reason. *Sullivan*, *supra* at 518. The determination of what is adequate provocation is a question of fact for the trier of fact. *Id.* The trial judge found that the emotional excitement had been going on for a long time, there were arguments back and forth, and Wynter and defendant had been talking on the phone for some time, and concluded that she had "no idea what had happened just prior to the time that the defendant put her foot on that gas and revved that car up." Evidently, the court found

the record devoid of evidence regarding adequate provocation.

There were no witnesses other than defendant who could testify regarding what occurred before the killing. In concluding that the facts did not warrant a finding of manslaughter, the court emphasized that the couple had been arguing for quite some time and that defendant knew of Bryant's relationship with Wynter. Nothing in the record indicates that anything, other than the same situation she had been coping with for a lengthy period, compelled defendant to go in search of Bryant.[3]

Furthermore, the trial court concluded that, even if they had an argument before defendant hit Bryant, sufficient time had passed to constitute a "cooling off" period during which time a reasonable person could control her passions. Throughout the sequence of events, defendant had time to take a second look before she acted. Trial evidence indicated that Wynter received a voice mail message from Bryant around 9:00 or 10:00 a.m. Thereafter, Bryant walked down the street on the sidewalk toward the house where Wynter was staying, which happened to be a house in the vicinity of defendant's home. As Bryant was walking on the sidewalk, defendant's vehicle jumped the curb and hit Bryant at approximately 10:30 a.m. In sum, we find that defendant failed to demonstrate that the outcome of the trial may have differed had defense counsel pursued a "heat of passion" theory.

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[3] Contrary to defendant's argument, the fact that defendant may have suffered from a diminished capacity at the time of the killing is irrelevant because provocation is measured under a reasonable person standard. As such, defendant's special mental qualities are not considered in measuring whether the provocation was adequate. *Sullivan*, *supra* at 519.

Defendant also contends that defense counsel's failure to move for a directed verdict constitutes ineffective assistance of counsel. In deciding whether to grant a motion for a directed verdict, the court must evaluate the evidence in the light most favorable to the prosecution. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). Defendant was not prejudiced by defense counsel's failure to move for a directed verdict because the court, at the *Ginther* hearing, indicated that a motion for a directed verdict would not have affected the outcome of the trial, because there was "entirely too much evidence for a . . . directed verdict."

Given the compelling evidence against defendant in this case, defense counsel was faced with a choice among several weak defenses. The record indicates that defense counsel acted diligently in this case. She interviewed possible witnesses, communicated with defendant on a regular basis, and investigated the plausible defense theories. At the *Ginther* hearing, defense counsel explained that she considered several defenses. When she rested, she thought that she had won on the theory of accident and that the prosecution had failed to prove its case as to second-degree murder. She also testified that based on the evidence and the judge's comments in chambers, that the judge did not believe any of the prosecution witnesses. Hence, she was certain she should rest at that time. Her explanations indicate that counsel made a strategic decision to proceed on an accident theory and not to pursue the alternate theories. The fact that defense counsel's strategy did not work does not render its use ineffective assistance of counsel. *Ayres*, *supra*. Although defense counsel testified that she should have taken a break

before she rested, this Court does not assess counsel's performance with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Although there may have been evidence to support alternate defenses, we find that defendant failed to assert her right to such defenses or establish that those defenses were substantial such that they might have made a difference in the outcome of the trial. *Ayres*, *supra*. Therefore, defense counsel's performance did not fall below an objective standard of reasonableness. *Pickens*, *supra* at 303.

Defendant next claims that her sentence was disproportionately harsh. Because the crime occurred after January 1, 1999, defendant was subject to the statutory sentencing guidelines. *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). The guidelines established a minimum sentence range of 162 to 270 months. MCL 777.21; MCL 777.61. Defendant's minimum sentence of 216 months was within the statutory guidelines range. Because defendant's minimum sentence was within the guidelines and defendant does not contend that the court erred in scoring the guidelines or relied upon inaccurate information at sentencing, further review of defendant's sentence is precluded. MCL 769.34(10). *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2000). When a minimum sentence falls within the appropriate guidelines range, this Court must affirm that sentence. MCL 769.34(10); *Babcock*, *supra*.

We affirm.

/s/ JESSICA R. COOPER
/s/ JOEL P. HOEKSTRA
/s/ JANE E. MARKEY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 04-CV-71575-DT

HONORABLE GERALD E. ROSEN
UNITED STATES DISTRICT JUDGE

HONORABLE MORGAN
UNITED STATES MAGISTRATE JUDGE

LANISE BASON,

Petitioner,

—v.—

JOAN YUKINS,

Respondent.

LANISE BASON #319076
Robert Scott Correctional Facility
47500 Five Mile Rd.
Plymouth, Michigan 48170

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Traverse to Respondent's Answer Opposing Petition for Writ of Habeas Corpus

Petitioner, hereby, reply and contend against Respondent's answer in opposition to application for writ of habeas corpus in the above action.

For all the reasons previously presented in her petition and in this traverse, Petitioner believes she has shown a violation in the US Const VI Amendment, guaranteed right, to the assistance of counsel for her defense and the necessity of this court to review her sentence.

A. Statement of the Case

Counsel testified, at the Ginther hearing (EV tr 9/19/01 p 20), of Petitioner going against her advice to waive jury trial and yet the state choose to believe this. Petitioner asserts that trial counsel *did* advise her to waive a jury trial, *just like* counsel advised her to not present a defense. Petitioner did not go against *counsel's advice.*

In Petitioner's case, the fact that she suffered a closed head injury, in a "semi-coma" state for a week from crashing into a tree, within the offense seems to not be addressed. (tr 5/26/00 p 117) This is evidence that supports her not having the intent needed to perform second degree murder.

Did the Michigan Supreme court deny Petitioner's application for leave to appeal because "the court was not persuaded that the question presented was *entitled* to review", as the Respondent stated (Answer p.2) Or was it because the court was not "persuaded that the questions presented *should be reviewed by this court*", as stated in the decision May 15, 2003.

B. Statement of Habeas claims

Petitioner contends that alleged trial errors did have a substantial impact and influence on the outcome of her trial. Petitioner has relied on and referred to many facts that are supported by the record.

STANDARD OF REVIEW

The office of writ is not to determine prisoner's guilt or innocence, and only issue which it presents is whether prisoner *is restrained of his liberty by due process*. . . . Habeas corpus ad subjiciendum is the most common form of habeas corpus writ, the purpose of which is to test the legality of the detention or imprisonment; *not whether he is guilty or innocent*. This writ is guaranteed by U.S. Const Art. I, § 9, and by state Const. Black's Law Dictionary, Abridged Sixth Edition, p 491.

Argument

I. Ineffective assistance of counsel.

Respondent claims ineffective assistance of counsel has not been established. The Michigan Court of

Appeals found that there were "compelling reasons for counsel to reject each of Petitioner's defenses. Counsel made a strategic decision to proceed on an accident theory and not to pursue the alternate theories. . . there may have been evidence to support alternate defenses. The court found that Petitioner failed to assert her right to such defenses." COA decision Aug. 30, 2002. Petitioner has a due process right to *present a defense*. Counsel did not present any evidence to support the "accident theory" that she rested the case on. In *Young* v. *Zant*, 677 F.2d 792 (11th cir. 1982) "trial counsel's representation of an insanity defense without *evidence to support* said defense, amounted to *no defense* at all and constituted ineffective assistance." In this case, counsel knew from Petitioner and state's witnesses that Petitioner was ill on the day of offense and at some point she lost controll of her car. Counsel did not investigate or present any evidence to support an accident defense. "Counsel's failure to investigate and present evidence consistent with defendant's claim that shooting was accidental and at close range, where there was powder residue on quilt with bullet holes, constitutes ineffective assistance of counsel." *Sims* v. *Livesay*, 970 F.2d 1575 (6th Cir. 1992)

Counsel recognized that diminished capacity isn't a defense to second degree murder. However, trial counsel pursued this defense during the course of trial. The evidence and testimony of both Psychiatrist/Psychologist and examining physician indicates the Petitioner's mental state in which she could not perform the intent necessary to commit said crime. In *U.S.* v. *Reveron Martinez*, 836 F.2d 684 (1st cir. 1988) "trial counsel's failure to raise defense of

insanity or diminished capacity may constitute ineffective assistance of counsel." Although it is said that diminished capacity isn't a defense to second degree murder, this is mitigating evidence for the trier of fact to consider in its findings.

In trial counsel's opening statement, counsel said "My client filed for a divorce against Mr. Branch eleven days before this situation occurred. My client had PPO's taken out against Mr Branch in 1998. . . My client has witnesses who will testify to the abuse. They witnessed slapping, hitting around, beating up. . . . *There will be a lot of testimony that will support a defense* position. My client didn't plan anything. If hest, the worst case scenario in this case would be that she was completely provoked and in *hot blood*, completely" (tr 4/17/00 p 29-32). Trial counsel failed to give promised testimony and evidence by not calling any witnesses or presenting said evidence in opening statement. "Trial counsel rendered ineffective assistance during opening arguments stating he would call expert witness during trial and failed to call said witness." *Anderson* v. *Butler*, 858 F.2d 16 (1st Cir. 1988) And "trial counsel's failure to call witnesses to the stand after stating in opening arguments that he would put on several witnesses, constitutes ineffective assistance of counsel." *Harris* v. *Reed*, 894 F.2d 871 (7th Cir. 1990).

There is no justification for counsel not presenting a heat of passion defense. "Trial counsel's failure to present defense of lesser included charge of voluntary manslaughter based on a very strong argument that the killing occurred during the heat of passion, constituted ineffective assistance." *Young* v. *Zant*, 677 F.2d 792 (11th Cir. 1982). Again, counsel

stated "the worst case scenario in this case would be that she was completely provoked and in hot blood" (tr 4/17/00 p 32). Counsel said heat of passion was not there because there was no physical abuse the day of the incident (EV tr 9/19/01 p 7 & 14). "Heat of passion refers to passion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at the time. As sufficient to reduce killing from murder to voluntary manslaughter means any intense or vehement emotional excitement of the kind prompting violent and aggressive action, which would cause an ordinary person to act on impulse without reflection, "*not intended or thought out*". The term includes an emotional state of mind characterized by anger, rage, hatred, furious resentment or terror. See also Hot blood." Black's Law Dictionary Abridged Sixth Edition p 498.

In *U.S.* v. *Swanson*, 943 F.2d 1070 (9th Cir. 1991) "trial counsel abandoned Petitioner's only defense which was inherently prejudicial where counsel conceded only factual issue in dispute in closing arguments and, deprived Petitioner of effective assistance of counsel and due process, thus *no showing of prejudice was necessary*." Counsel abandoned Petitioner's defense by not presenting anything. "Counsels overall performance, including his decision not to put on any witnesses in support of a viable theory of defense, falls outside the wide range of professionally competent assistance. . . Counsel tempted fate when he decided to rest on perceived weakness of the prosecutor's case". *Harris* v *Reed*, 894 F.2d 871 (7th Cir. 1990) In the present case trial counsel thought the prosecutor didn't prove it's case, attempting fate here also.

"Trial counsel's failure to investigate defendant's mental condition, where it is apparent from the crime itself and conversations with the defendant that he suffered from mental problems, which would constitute mitigating evidence for sentencing, was ineffective assistance of counsel." *Hall* v. *Washington*, 106 F.3d 742 (7th Cir. 1997) Petitioner's trial counsel presented no evidence for the court to consider when her sentence was imposed. Even for sentencing purpose, counsel was ineffective.

Petitioner's ineffective assistance claim warrants habeas relief where trial counsel's performance fell outside the wide range of competent assistance and counsel was not performing as the assistance of counsel guaranteed by the US Const. Ament VI.

II. Sentence Review.

Petitioner doesn't know if there are any legal claims favoring a review of her sentence. Nevertheless, she maintains that her previous arguments in her petition and the COA brief may cause for legal action. Respondent argues that Petitioner's claim is not cognizable in federal habeas corpus proceedings. (Answer p.8) If that is the case, Petitioner ask that this court construct a rule that bars disproportionate sentences from being imposed. Therefore, this court will alleviate this vastly appearing claim.

Conclusion

For all previous and present reasons, Petitioner ask that this court grant habeas corpus relief or any other relief the court may deem necessary.

Respectfully submitted,

/s/ LANISE BASON

Lanise Bason, #319076, Pro Se
Robert Scott Corr. Fac.
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Plymouth, MI 48170

Dated: November 16, 2004
Traverse

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 04-CV-71575-DT

HONORABLE GERALD E. ROSEN
UNITED STATES DISTRICT JUDGE

HONORABLE PAUL J. KOMIVES
UNITED STATES MAGISTRATE JUDGE

LANISE BASON,

Petitioner,

—v.—

JOAN YUKINS,

Respondent.

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Respondent's Answer in Opposition to Application for Writ of Habeas Corpus

Respondent, through attorneys, Michael A. Cox, Attorney General of the State of Michigan, and Debra M. Gagliardi, Assistant Attorney General, hereby answers and opposes the petition for a writ of habeas corpus in the above action.

A. Statement of the Case

Petitioner was convicted in a Wayne County bench trial of second-degree murder and sentenced to a term of 18 – 50 years' imprisonment.

Petitioner was charged with the murder of her husband, Bryant Branch. Against counsel's advice, Petitioner waived a jury trial. The evidence established Petitioner, while driving her car at a high rate of speed, jumped a curb and struck her husband while he was walking on the sidewalk. Her husband was flung into a tree and was killed instantly.

The trial court granted Petitioner's post-conviction motion for a *Ginther* hearing to address her claim of ineffective assistance of counsel. Following the *Ginther* hearing on September 19, 2001 found that, based on the circumstances of this case, counsel was not ineffective.

In her appeal of right Petitioner argued the following:

I. Defendant is entitled [to] a new trial where she had ineffective assistance of counsel.

II. The sentence imposed is disproportionate under *People* v. *Milbourne*, 435 Mich 630 (1990) given the nature of the crime and the sentence imposed. [Michigan Court of Appeals, Defendant-Appellant's Brief on Appeal]

The Michigan Court of Appeals affirmed Petitioner's convictions. *People* v. *Bason*, No. 230157 (Mich. App,, Aug. 30, 2002). The Michigan Supreme Court denied Petitioner's application for leave to appeal from the August 30, 2002 decision of the Court of Appeals because the court was not persuaded that the question presented was entitled to review. Justice Kelley indicated she would remand for further proceedings concerning whether Petitioner was denied ineffective assistance of counsel *People* v *Belson*, No. 122324 (Mich., May 15, 2003).

B. Statement of Habeas Claims

The present pro se petition for writ of habeas corpus was signed and filed by Petitioner pursuant to 28 U.S.C. § 2254 on August 25, 2004 and sets forth the following grounds for relief:

I. Defendant is entitled to a new trial where she had ineffective assistance of counsel.

II. The sentence imposed is disproportionate under *People* v *Melbourne* 435 Mich 630 (1990) given the nature of his [sic] crime

> and the sentence imposed. [Brief in Support of Petition for Writ of Habeas Corpus]

Respondent now answers the petition and requests that it be denied for the reasons stated in the argument section, *infra*. In addition, Respondent asserts any and all available defenses including failure to exhaust state court remedies, the statute of limitations, and procedural default for each claim to which it is applicable. To the extent that any of the alleged trial errors are meritorious, Respondent asserts that they did not have a substantial impact or influence on the outcome of Petitioner's trial. Respondent also objects to Petitioner's statement of the facts to the extent that the statements are not supported by the record. Respondent opposes any request for discovery, evidentiary hearings, bond, oral argument, or any other relief.

STANDARD OF REVIEW

The standard of review federal courts must apply to petitions for writ of habeas corpus filed after the April 24, 1996 effective dated of the Act, is established by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat.1214 (AEDPA), See *Wiggins* v. *Smith*, 156 L. Ed. 2d 471, 123 S. Ct. 2527 (2003) and *Lindh* v. *Murphy*, 521 U.S. 320, 336 (1997).

In this case, Petitioner's application was filed after April 24, 1996 and the following revised standard of review established by the AEDPA applies:

> An application of a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted

> with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. [28 U.S.C. § 2254(d)]

Thus, where a state court has rejected the petitioner's claims on the merits, the petitioner must demonstrate that the state court's decision was "contrary to" or an "unreasonable application of" Supreme Court precedent.

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. The Court has clarified that the phrase "clearly established federal law, as determined by the Supreme Court of the United States," refers only to "holdings, as opposed to the dicta, of [the Court's] decisions as of the time of the relevant state court decision. *Williams*, 529 U.S. at 412.

The "unreasonable application" prong permits the writ to be granted when a state court identifies the correct governing legal principle but unreasonably applies it to the facts of a petitioner's case. *Williams*

v. *Taylor*, 529 U.S. 362, 411.413 (2000). For this standard to be satisfied, the state court decision must have been "objectively unreasonable" *Williams*, 529 U.S. at 409, not just incorrect or erroneous.

Additionally, under § 2254(d)(2) to establish that the state court's decision was based on an "unreasonable determination of the facts in light of the evidence presented," an applicant is subject to § 2254(e)(1), which states:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. *See also Warren* v. *Smith*, 161 F.3d 358, 360-361.

In other words, mere error by a state court does not justify the issuance of the writ. The Petitioner must demonstrate that the state court's application of federal law was objectively unreasonable, *Wiggins*, 123 S. Ct. at 2535 (citing *Williams*, 529 U.S. at 409). Additionally, state court factual determinations are entitled to a presumption of correctness. 28 U.S.C. § 2254(e)(1); *Cremeans* v. *Chapleau*, 62 F.3d 167, 169 (6th Cir. 1995). Clearly the Petitioner has a heavy burden under federal habeas law where the state court has considered and rejected his claims.

ARGUMENT

I. The state court determination that Petitioner was not denied effective assistance of counsel was not contrary to, or an unreasonable application of, established United States Supreme Court precedent. Accordingly, Petitioner is not entitled to habeas relief base on this claim.

Petitioner claims ineffective assistance of counsel for failing to put on a defense. This claim was addressed and rejected by the trial court in a post-conviction *Ginther* hearing and by the Michigan Court of Appeals. The state court determination that Petitioner was not denied the effective assistance of counsel was not contrary to, or an unreasonable application of, the established two-prong test for evaluating such claims set forth by the United States Supreme Court in *Strickland* v. *Washington*, 466 U.S. 668 (1984).

In *Strickland* v. *Washington* the Supreme Court set forth a two-part test for habeas review of Sixth Amendment claims of ineffective assistance of counsel. A habeas petitioner must first show that counsel's performance was deficient, i.e., that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, a habeas petitioner must show that counsel's deficient performance actually prejudiced the defense so as to deprive petitioner of a fair trial. *Strickland*, 466 U.S. at 687. The court presumes that counsel is competent and the burden is on petitioner to demonstrate a constitutional violation. *United States* v. *Pierce*, 62 F.3d 818, 833 (6th Cir. 1995)(citing *United States* v. *Cronic*, 466 U.S.

648, 658; 104 S. Ct. 2039, 2046; 80 L. Ed. 2d 657 (1984)).

In the present case, the Michigan Court of Appeals thoroughly reviewed Petitioner's claim of ineffective assistance of counsel under the *Strickland* Standard. After addressing the various potential defenses available to Petitioner and finding that there were compelling reasons for counsel to have rejected each, the state court concluded the following:

> Given the compelling evidence against defendant in this case, defense counsel was faced with a choice among several weak defenses. The record indicates that defense counsel acted diligently in this case. She interviewed possible witnesses, communicated with defendant on a regular basis, and investigated the plausible defense theories. At the *Ginther* hearing, defense counsel explained that she considered several defenses. When she rested, she thought that she had won on the theory of accident and that the prosecution had failed to prove its case as to second-degree murder. She also testified that based on the evidence and the judge's comments in chambers, that the judge did not believe any of the prosecution witnesses. Hence, she was certain she should rest at that time. Her explanations indicate that counsel made a strategic decision to proceed on an accident theory and not to pursue the alternate theories. The fact that defense counsel's strategy did not work does not render its use ineffective assistance of counsel. *Ayres*, *supra*. Although defense counsel testified that she should have taken a break before she rested, this court does not

> assess counsel's performance with the benefit of hindsight. *People* v. *Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).
>
> Although there may have been evidence to support alternate defenses, we find that defendant failed to assert her right to such defenses or establish that those defenses were substantial such that they might have made a difference in the outcome of the trial. *Ayres*, *supra*. Therefore, defense counsel's performance did not fall below an objective standard of reasonableness. *Pickens*, *supra* at 303. *People* v. *Bason*, No. 230157 (Mich. App., Aug. 30, 2002)

While it is true that defense counsel must investigate all appropriately substantial defenses available to the defendant and must assert them in a timely manner (see *Fornash* v. *Marshall*, 686 F.2d 1179, 1187 (6th Cir, 1982); cert. den. 460 U.S. 1042 (1983), no prejudice results from a lawyer's failure to raise a potential defense, unless the defense would likely have succeeded at trial. *United States* v. *Holland*, 326 U.S. App. D.C. 35, 117 F.3d 589, 595 (D.C. Cir. 1997); *Mangum* v. *Hargett*, 67 F.3d 80, 84 (5th Cir. 1995); *cert. den.* 516 U.S. 1133 (1996).

In the present case Petitioner acknowledges that defense counsel investigated the defenses of diminished capacity and battered wife syndrome and heat of passion. Counsel testified at the *Ginther* hearing that her investigation turned up no evidence of police reports to support that Petitioner had been battered by husband. Counsel recognized that diminished capacity was not a defense to second degree murder. Counsel concluded that the only viable argument was that the killing was an accident.

The trial court expressed concern about defense counsel's decision to rest after the prosecution's case, however, found counsel's performance competent following argument on a defense motion to reopen proofs and the hearing on counsel's effectiveness. In light of the evidence presented and the circumstances of this case counsel's performance was not deficient and Petitioner had failed to establish the first prong of the *Strickland* test.

Counsel's actions did not amount to deficient performance. As a result, it is unnecessary to address the question of whether counsel's actions resulted in unconstitutional prejudice to the Petitioner. *Strickland*, 466 U.S. 668. The Michigan Court of Appeals resolution of Petitioner's ineffective assistance of counsel claim was not contrary to, nor an unreasonable application of, clearly established United States Supreme Court law. Accordingly, Petitioner's ineffective assistance of counsel claim does not warrant habeas relief.

II. Petitioner's sentencing claim is not cognizable in federal habeas corpus proceedings.

Petitioner also claims the trial court abused the principle of proportionality in imposing her sentence of 18 to 50 years imprisonment. Petitioner argues her sentence violates state law and fails to assert or establish a federal constitutional violation. Accordingly, her sentencing claim is not cognizable in federal habeas corpus proceedings.

The Michigan Court of Appeals rejected this claim, finding that his minimum sentence for second-degree murder is within the sentencing guidelines

range and is, therefore, presumptively proportionate.

In any event, the U.S. Constitution does not require that sentences be proportionate. In *Narmelin* v. *Michigan*, 501 U.S. 957, 965 (1991), the Court held that the Eighth Amendment does not contain a requirement of strict proportionality between the crime and sentence. The Eighth Amendment forbids only extreme sentences that are grossly disproportionate to the crime. *Harmelin*, 501 U.S. at 1001. Successful challenges to the proportionality of a particular sentence in non-capital cases like this one are "exceedingly rare". *Rummel v. Estelle*, 445 U.S. 263, 272, 63 L. Ed. 2d 382, 100 S. Ct. 1133 (1980). Petitioner's claim that her sentence is disproportionate under Michigan law fails to state a claim upon which habeas relief can be granted. Petitioner's claim that his sentence is disproportionate under Michigan law thus would not state a claim upon which habeas relief can be granted. *Whitfield v. Martin*, 157 F. Supp. 2d 758, 761 (E. D. Mich. 2001)

Petitioner's argument that the trial court failed to individualize her sentence by considering mitigating factors on her behalf also fails to state a claim upon which habeas relief can be granted. The United States Supreme Court has refused to extend the doctrine of individualized sentencing to noncapital cases. *See Harmelin* v. *Michigan*, 501 U.S. at 995-996. In *Harmelin*, the U.S. Supreme Court held that imposition of a mandatory life sentence without parole without any consideration of any mitigating factors, such as the defendant's work history, did not constitute cruel and unusual punishment. *Id.* at 994-995. Because petitioner had no constitutional

right to have the sentencing court consider her individual circumstances, no constitutional error would occur if the state trial court failed to consider mitigating evidence on her behalf at sentencing.

CONCLUSION

For the foregoing reasons, Respondent asks this Court to dismiss this habeas corpus petition.

Respectfully submitted,

Michael A. Cox
Attorney General

Debra Gagliardi
Assistant Attorney General
Criminal Appellate Division
P.O. Box 30217
Lansing, MI 48909
(517) 373-4875

Dated: November 1, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL NO. 04-CV-71575-DT
HONORABLE GERALD E. ROSEN
MAGISTRATE JUDGE MORGAN

LANISE BASON, #319076
Petitioner,

—v.—

J.N. YUKINS,
Respondent.

MOTION TO AMEND

Petitioner, Lanise Bason, Pro Se, moves to amend her original petition received by the court on April 27, 2004.

1. A change is needed in regards to the defenses of Diminished Capacity and Heat of Passion not being investigated. This was stated incorrectly.

2. In regards to trial counsel rendering ineffective representation, additional facts to be considered are being submitted.

3. And a Motion to Remand for a further evidentiary hearing, on the issue of ineffective assistance of counsel, is being submitted to resolve matters that are not clear or contained in the record that may demonstrate trial counsel's ineffective representation.

Petitioner's amended pleading is attached for filing.

Respectfully Submitted,

Date: August 25, 2004

/s/ Lanise Bason
Lanise Bason #319076, Pro Se
Robert Scott Corr. Fac.
47500 Five Mile Rd
Plymouth, MI 46170

HABEAS CORPUS BY A PERSON
IN STATE CUSTODY

UNITED STATES DISTRICT COURT

District
Eastern District of Michigan

LANISE BASON

Prisoner No.
319076

Case No.
04-71575

Place of Confinement
Robert Scott Correctional Facility
47500 Five MIle Road
Plymouth, MI 48170

HONORABLE GERALD E. ROSEN

MAGISTRATE JUDGE MORGAN

Name of Petitioner
(include name under which convicted)
LANISE BASON

Name of Respondent
(authorized person having
custody of petitioner
V. J. N. YUKINS, Warden

The Attorney General of the State of:
Michigan

PETITIONER'S AMENDED PLEADING

1. Name and location of court which entered the judgment of conviction under attack

   Frank Murphy Hall of Justice,
   1441 St. Antoine,
   Detroit, MI 48226

2. Date of judgment of conviction

   May 30, 2000

3. Length of sentence

   18 to 50 years

4. Nature of offense involved (all counts)

   2nd Degree Murder MCL 750.317

5. What was your plea? (Check one)

   (a) Not guilty ☒

   (b) Guilty ☐

   (c) Nolo contendere ☐

   If you entered a guilty plea to one count or indictment and a not guilty plea to another count or indictment, give details

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

   (a) Jury ☐

   (b) Judge only ☒

7. Did you testify at the trial?

   Yes ☒ No ☐

8. Did you appeal from the judgment of conviction?

Yes ☐ No ☐

9. ___ you did appeal, answer the following:

(a) Name of court

Michigan Court of Appeals

(b) Result

Affirmed See Attachment A

(c) Date of result and citation, if known

August 30, 2002
COA NO. 230157
unpublished

(d) Grounds raised

See Attachment B
COA Brief

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court

Michigan Supreme Court

(2) Result

Denied
See Attachment C

(3) Date of result and citation, if known

May 15, 2003
Supreme Court No. 122324

(4) Grounds raised

See Attachment B
COA Brief

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of Court

(2) Result

(3) Date of result and citation, if known

(4) Grounds raised

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?

Yes ☐ No ☒

11. If your answer to 10 was "yes", give the following information

(a) (1) Name of court

(2) Nature of proceeding

(3) Grounds raised

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result

(6) Date of Result

(b) As to any second petition, application or motion give the same information:

(1) Name of Court

(2) Name of proceeding

(3) Grounds raised

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result

(6) Date of result

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc.

Yes ☐ No ☐

(2) Second petition, etc.

Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages state additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state remedies with respect to them. However, you *should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these ground's for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one:

DEFENDANT IS ENTITLED TO A NEW TRIAL WHERE SHE HAD INEFFECTIVE ASSISTANCE OF COUNSEL.

Supporting FACTS (state *briefly* without citing cases or law)

See Attached pages 5A – 5D

B. Ground two:

THE SENTENCE IMPOSED IS DISPROPORTIONATE UNDER PEOPLE V MILBOURNE 435 MICH 630 (1990) GIVEN THE

NATURE OF HIS CRIME AND THE EVIDENCE IMPOSED.

Supporting FACTS (state *briefly* without citing cases or law)

The victim's brother said "Lanise was a good girl" "And what had happened shocked everybody" (sent tr 8/24/00 p 31). The trial court said in it's guilty findings, "And I'm quite convinced that the Defendant did not intend to kill. I know that. She didn't intend to kill this man" (tr 5/10/00 p 96-97). Then on the sentencing day 8/24/00 p 46 the court said "the minimum that they have set forth here is 162 months, which I think is a little bit low for a murder of this type". Again, the court said the Defendant didn't intend to kill. The sentence should be reviewed, it does not fit the defendant.

Ground one:

DEFENDANT IS ENTITLED TO A NEW TRIAL WHERE SHE HAD INEFFECTIVE ASSISTANCE OF COUNSEL.

Supporting facts:

A defense was not put on. Counsel knew and said "my client depend on me for her defense" (tr 4/17/00 p 23). Petitioner is being held accountable for not bringing on a defense when she was advised by counsel not to put on one.

A defense of Diminished Capacity was investigated. Counsel pursued this defense knowing that it isn't a defense to second degree murder. Counsel said "I knew from the get go that there was no diminished capacity" (tr 9/19/01 p 28) Yet, trial counsel requested an expert to examine and evaluate the petitioner for Diminished Capacity. (Exhibits 1-3) Counsel also said, "I knew that there was no diminished capacity in spite of the conclusion that was reached. I knew we couldn't get there" (tr 9/19/01 p 30) Counsel knew from the petitioner and other testimony that the petitioner was ill the morning of incident. Counsel didn't offer petitioner's illness as a mitigating factor to consider. Nor did counsel consider the medicine she had taken that day for it's effect. Counsel said "there was no drug intake, there wasn't anything for the Diminished Capacity" (tr 9/19/01 p 17).

Battered wife syndrome was the examining psychologist conclusion. This defense was investigated. Counsel requested a private investigator. (Exhibit 4) Counsel said the private investigator couldn't find any police report's to support a battered wife syn-

drome defense. (tr 9/19/01 p 25) After petitioner was found guilty, counsel still listed the police custodial records on the Defendant's Amended Witness List. (Exhibit 5) This was when counsel motioned the court to amend it's findings or reopen the case. If there were no records, why were they listed on the amended witness list, which was after counsel rested the case.

The prosecutor argued that petitioner wasn't happy seeing her husband with another woman and that petitioner did not want a divorce. Petitioner is the Plaintiff on her divorce complaint. (Exhibit 6) Counsel did not offer this into evidence to rebut the prosecutor saying petitioner did not want a divorce or to see her husband with someone else. Petitioner also had a Personal Protection Order against the victim several months prior that was not offered to rebut the witness's testimony that the petitioner was the violent one. (Exhibit 7)

Counsel said if she had brought in the expert witness they would be "getting into the statement" of petitioner's. Prosecution claims there was possible evidence to support premeditation in petitioner's statement. Looking at petitioner's statement, there was possible evidence to support heat of passion or an imperfect self defense for the battered wife's syndrome. Petitioner's statement was suppressed.

When petitioner's statement was suppressed, counsel said she was in a state of euphoria and should have taken a break (tr 9/19/01 p 12). There were times during the trial where counsel may have been oblivious. The court pointed out she must have been tired and needed to go home and get some rest (tr 4/17/00 p 74). She had forgot witness' testimony

(tr 4/17/00 p 49) and (tr 4/19/00 p 155) And she lost her train of thinking (tr 4/19/00 p 156).

Trial counsel used an accident theory as trial strategy. Although the petitioner told trial counsel "it was an accident" and "I don't know what happened" (tr 9/19/01 p 15) counsel didn't investigate or present evidence to support an accident defense. Counsel didn't offer the medical examiner's report for victim's cause of death being pinned between a vehicle and a fixed object. (tr 3/30/99 p 4-5) This would have contradicted the eyewitness' testimony. And counsel didn't investigate the vehicle for any mechanical defects. The prosecutor argued that this was a goal directed intentional act. Counsel did not put forth the vigor to show that a goal directed intentional act would mean that the person has control. Control was lost for the petitioner to have been in a semi-coma from crashing into a tree.

Counsel did consider heat of passion. Counsel said heat of passion was not there because there was no physical abuse the day of the incident (tr 9/19/01 p 7 & 14). Counsel had an inaccurate interpretation of heat of passion and this shouldn't be acceptable. The prosecutor questioned counsel about petitioner making threats "If I can't have him, nobody else will", and counsel said "she never said that" (tr 9/19/01 p 23). Yet, counsel offered no testimony to disprove it.

Even for sentencing purposes counsel failed to use the expert witness as stated in the Motion to Reopen Case. (Exhibit 8) The court also said that "I didn't hear from anybody who could have told me anything about an emotional excitement because you can take into account that the defendant is mentally or emotionally impaired. You may consider

that." (tr 6/16/00 p 8-9) At the sentencing hearing the court did not consider the minimum sentence, because the court said "there was no showing of any problem or anything else that would have indicated why that this should be reduced". (tr 8/24/00 p 45-46) Counsel did not present any mitigating evidence at trial.

The court said "I have some severe problems here. I feel like I didn't hear a defense" (tr 6/16/00 p 10) And the court was almost at the point to where they would allow a new trial because the court said "I'm concerned that when this case goes up, that they may find that there was an error committed here that was of such magnitude that there might have been either a reduction in the charge or something" (tr 6/16/00 p 11).

The Michigan court of appeals said that counsel was faced with a choice among several weak defenses (COA p 4). It will not be known if petitioner has a weak defense if it is not presented. Counsel was ineffective for not presenting a defense or any mitigating evidence to support a lesser charge and a lenient sentence.

C. Ground three:

Supporting FACTS (state *briefly* without citing cases or law)

D. Ground four:

Supporting FACTS (state *briefly* without citing cases or law)

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ☐ No ☒

15. Give the name and address, if known, of any attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing

Thomas Binion p 26302
18620 Muirland St.,
Detroit, MI 48221-2203

(b) At arraignment and plea

Thomas Binion
Wendy Barnwell p 42505
1150 Griswold St., Suite 3100,
Detroit, MI 48226

(d) At sentencing

Wendy Barnwell

(e) On appeal

George Corsetti p12238
3512 Courville,
Detroit, MI 48224

(f) In any post-conviction proceeding

George Corsetti

(g) On appeal from any adverse ruling in a post-conviction proceeding

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which the sentence to be served in the future?

Yes ☐ No ☒

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

August 25, 2004
(date)

/s/ LANISE BASON
Signature of Petitioner

RECEIPT NUMBER 200506892 ORIGINAL

HABEAS CORPUS BY A PERSON IN STATE CUSTODY

GERALD E. ROSEN

UNITED STATES DISTRICT COURT

District
Eastern District of Michigan

Name:
Lanise Bason

Prisoner No.
319076

Case No.
04 71575

Place of Confinement
Robert Scott Correctional Facility
47500 Five Mile Road
Plymouth, MI 48170

MAGISTRATE JUDGE MORGAN

Name of Petitioner
(include name under which convicted)
Lanise Bason

V.

Name of Respondent
(authorized person having custody of petitioner)
J. N. Yukins, Warden

The Attorney General of the State of:
Michigan

PETITION

1. Name and location of court which entered the judgment of conviction under attack Frank Murphy Hall of Justice

   1441 St. Antoine, Detroit, MI 48226

2. Date of judgment of conviction May 30, 2000

3. Length of sentence 18 to 50 years

4. Nature of offense involved (all counts) 2nd degree Murder MCL 750.317

5. What was your plea? (Check one)

   (a) Not guilty [X]

   (b) Guilty [ ]

   (c) Nolo contendere [ ]

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details.

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

   (a) Jury [ ]

   (b) Judge only [X]

7. Did you testify at the trial?

   Yes [ ] No [X]

8. Did you appeal from the judgment of conviction?

   Yes [X] No [ ]

9. If you did appeal, answer the following:

(a) Name of Court
Michigan Court of Appeals

(b) Result Affirmed
See Attachment A

(c) Date of result and citation, if known
August 30, 2002
COA: 230157 Unpublished

(d) Grounds raised
See Attachment B COA brief

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court
Michigan Supreme Court

(2) Result Denied
See Attachment C

(3) Date of result and citation, if known
May 15, 2003
SC: 122324

(4) Grounds raised
See Attachment B COA brief

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court

(2) Result

(3) Date of result and citation, if known

(4) Grounds raised

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

    Yes ☐ No ☒

11. If your answer to 10 was "yes", give the following information:

    (a) (1) Name of court

    (2) Nature of proceeding

    (3) Grounds raised

    (4) Did you receive an evidentiary hearing on your petition, application or motion:

    Yes ☐ No ☐

    (5) Result

    (6) Date of result

    (b) As to any second petition, application or motion give the same information:

    (1) Name of court

    (2) Nature of proceeding

    (3) Grounds raised

    (4) Did you receive an evidentiary hearing on your application or motion?

    Yes ☐ No ☐

    (5) Result

    (6) Date of result

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☐

(2) Second petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages state additional grounds and *facts* supporting same.

CAUTION: *In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.*

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds, If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel

(j) Denial of right of appeal.

A. Ground one: DEFENDANT IS ENTITLED TO A NEW TRIAL WHERE SHE HAD INEFFECTIVE ASSISTANCE OF COUNSEL.

Supporting FACTS (state *briefly* without citing cases or law) A **DEFENSE** was not put on. Counsel knew and said "my client does depend on me for her **DEFENSE**" (tr 4/17/00) p 23). Prosecution questioned Counsel about Defendant making threats "If I can't have him, nobody else will", and Counsel said "she never said that" (ev tr 9/19/01 p 23). Counsel offered to testimony/**DEFENSE** to disprove it. Although the Defendant told trial Counsel "it was an accident" and "I don't know what happened" (ev tr 9/19/01 p 15) Counsel didn't investigate or present an Accident **DEFENSE**. The **DEFENSES** of Diminished Capacity and Heat of Passion were considered but not investigated. Battered Spouse Syndrome was investigated but was not presented as a **DEFENSE**.

B. Ground two: THE SENTENCE IMPOSED IS DISPROPORTIONATE UNDER PEOPLE V MILBOURNE 435 MICH 630 (1990) GIVEN THE NATURE OF HIS CRIME AND THE SENTIENCE IMPOSED.

Supporting FACTS (state *briefly* without citing cases or law) The victim's brother said "Lanise was a good girl" "And what had happened shocked everybody" (sent tr 8/24/00 p 31). The trial court said in it's guilty findings, "And I'm quite convinced that the Defendant did not intend to kill. I

know that. She didn't intend to kill this man" (tr 5/30/00 p 96-97) Then, on the sentencing day 8/24/00 p 46 the court said "the minimum that they have set forth here is 162 months, which I think is a little bit low for a murder of this type." Again, the court said the Defendant didn't intend to kill. The sentence should be reviewed, it does not fit the Defendant.

C. Ground three:

Supporting FACTS (state *briefly* without citing cases or law)

D. Ground Four:

Supporting FACTS (state *briefly* without citing cases or law)

13. If any of the grounds listed in 12A, B, C. and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing
Thomas Binion P26302
18620 Muirland St.,
Detroit, MI 48221-2203

(b) At arraignment and plea
Thomas Binion

(c) At trial
Wendy Barnwell P42505
1150 Criswold St., Suite 3100,
Detroit, MI 48226

(d) At sentencing
Wendy Barnwell

(e) On appeal
George Corsetti P12238

(f) In any post-conviction proceeding
George Corsetti

(g) On appeal from any adverse ruling in a post-conviction proceeding

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time:

Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which the sentence to be served in the future?

Yes ☐ No ☒

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

April 20, 2004
(date)

/s/ LANISE BASON
Signature of Petitioner

ATTACHMENT B

STATE OF MICHIGAN
IN THE COURT OF APPEALS

Appeals No 230157
L.C. no 99-3035

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

—v.—

LANISE BASON,

Defendant-Appellant.

BRIEF OF DEFENDANT APPELLANT

(ORAL ARGUMENT REQUESTED)

GEORGE L. CORSETTI P 12238
Attorney for Defendant
3512 Courville
Det MI 48224
(313) 885-4685

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II. THE SENTENCE IMPOSED IS DISPROPORTIONATE UNDER PEOPLE V MILBOURN, 435 Mich 630 (1990) GIVEN THE NATURE OF HIS CRIME AND THE SENTENCE IMPOSED....12

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Appendix:

Presentence Report (filed separatley)

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STATEMENT OF QUESTIONS PRESENTED

I. DID DEFENDANT HAVE INEFFECTIVE ASSISTANCE OF COUNSEL AND IS SHE ENTITLED TO A NEW TRIAL?

The lower court answered the question, no.
Appellant contends the answer should be, yes.

II. IS THE SENTENCE IMPOSED IS DISPROPORTIONATE UNDER *PEOPLE* V *MILBOURN*, 435 Mich 630 (1990) GIVEN THE NATURE OF HIS CRIME AND THE SENTENCE IMPOSED?

The lower court answered the question, no.
Appellant contends the answer should be, yes.

JURISDICTION

Defendant appellant, Lanise Bason, was convicted in the Criminal Division of Wayne County Circuit Court after a bench trial, and a Judgment of Sentence was entered on 24 August 2000. A Claim of Appeal ws filed on 29 Sept 2000 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated 28 August 2000, as authorized by MCR 6.425 f 3. This court has jurisdiction in this appeal as of right privided for by MI Const 1963, art 1, sec 20, pursuant to MCL 600.308(1); MSA 27A.308, MCL 770.3; MSA 28.1100, MCR 7.203A, MCR 7.204A 2.

STANDARD OF REVIEW

Argument I—de novo *People* v *Pickens*,446 Mich 298 (1994)

Argument II—denovo *People* v *Milbourn* 435 Mich 630 (1990)

STATEMENT OF FACTS

In the present case, appellant, Lanise Bason, was originally charged with murder in the first degree in the death of her husband. Following the preliminary exam, Ms. Bason was bound over on Murder in the second degree. The court, Judge Jeanette O'Banner-Owens in 36th District Court, said,

> "The Court at this time binds over on murder two subject to any heat of passion argument being made as a form of the defense in the matter. I believe that you have a situation where a wife was treated very bad. Not only to think that there was a woman there that stated he [her deceased husband] had other women and children. I believe that she was suffering under the heat of passion."

(preliminary exam tr at 107)

Defendant, Bason, subsequently had a bench trial in front of the Honorable Vera Massey Jones in Wayne County Circuit Court. Following presentation of the prosecution's case, Defendant's attorney announced that she would **not** put on a defense case. (tr, vol V at 83). The trial court judge then found Ms. Bason guilty of Murder in the second degree and went on to find inadequate evidence of emotional excitement necessary for the lesser included offense of voluntary manslaughter. (tr V at 94-99)

Guidelines were scored at 162 to 337 months. Defendant was then sentenced to 18 to 50 years—216 months—within the guidelines. (tr 24 Aug 00 at 10, 46)

As for the specific facts there is no question but that defendant drove the car that killed her husband, Bryant Branch. As the Presentence Report indicates, "Witnesses observed the defendant driving at a high rate of speed. The defendant jumped the curb and struck the complainant who was walking on the sidewalk with her vehicle, flinging him into a tree and killing him instantly. The defendant lost control of her vehicle and ultimately hit a tree bringing her car to a rest." (presentence at 2)

Ms. Bason is a 28 year old woman with two children 8 and 10 years old who has never been arrested or convicted of anything and held a regular job as a secretary for the Burnett Baptist Church. (presentence report at 2, 4

Following appointment of appellate counsel a motion was filed for a *Ginther* hearing which was held on 19 Sept 2001. The trial court found that counsel was **not** ineffective. (tr 19 Sept 2001 at 48)

I. DEFENDANT IS ENTITLED TO A NEW TRIAL WHERE SHE HAD INEFFECTIVE ASSISTANCE OF COUNSEL

The standard of review for ineffectiveness of counsel is *de novo*, *People* v *Pickens*, 446 Mich 298, 359 (1994). The issue was preserved for appeal by a filing a post judgment motion followed by an evidentiary hearing and denial by the trial court.

The accused's state and federal Constitutional rights to counsel include the right to "effective assistance of counsel". US Const VI, Mich Const 1963, art 1, § 20; *Powell* v *Alabama*, 287 US 45; 53 S Ct 55; 77 L Ed 158 (1932), *People* v *Pickens*, 444 Mich 298 (1994). The Michigan Supreme Court has held:

> "We hold that the intention underlying the Michigan Constitution does not afford greater protection than federal precedent with regard to a defendant's right to counsel when it involves a claim of ineffective assistance of counsel. Thus, to find a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, **a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.**"

People v *Pickens*, 446 Mich 298, 302-303 (1994) (emphasis added).

Under the test currently applied, defense counsel is ineffective when his or her acts or omissions were not the result of reasonable professional judgment and when his performance is deficient. *Strickland* v *Washington*, 466 US at 668, 687 (1984); *People* v *Pickens*, *supra*. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below the objective standard of reasonableness, that she was not functioning as the effective "counsel" guaranteed by the Sixth Amendment, and that the errors prejudiced the defense to the extent that the defendant was denied a fair trial and a reasonable probability exists that, but for counsel's conduct, the fact-finder may have had a reasonable doubt with respect to his guilt. *Strickland*, *supra* 466 US at 687; *Pickens*, *supra*, 446 Mich at 303, 326-327. The defendant must overcome the presumption that, under the circumstances, the challenged inaction of trial counsel could be sound

trial strategy. *People* v *LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995).

In the present case Defendant-Appellant, Lanise Bason, was charged with murder in the second degree in the death of her husband, Bryant Branch. She waived a jury and had a bench trial in front of Judge Vera Massey Jones in the Wayne County Circuit Court Criminal Division. Following presentation of the prosecution's case, Defendant's attorney announced that she would **not** put on a defense case. (tr, vol V at 83) The trial court judge then found Ms. Bason guilty of Murder in the second degree. (tr V at 94-99) As for the specific facts, the Presentence Report indicates, "Witnesses observed the defendant driving at a high rate of speed. The defendant jumped the curb and struck the complainant, who was walking on the sidewalk, with her vehicle, flinging him into a tree and killing him instantly. The defendant lost control of her vehicle and ultimately hit a tree bringing her car to a rest." (presentence at 2) Following appointment of appellate counsel a motion was filed for a *Ginther* hearing which was held on 19 Sept 2001. The trial court found that counsel was **not** ineffective. (tr 19 Sept 2001 at 48) **Counsel's performance fell below an objective standard of reasonableness and defendant was prejudiced as a result.**

In the opening statement, defense counsel, Wendy Barnwell, said that in the course of the trial, the defense would demonstrate that defendant **feared her husband**, the deceased, and that she "was abused—**she was a battered woman**". (tr 17 Apr 2000 @ 32) Attorney, Barnwell, said she would show that defendant had gotten a personal protection order against the deceased and that ultimately

defendant had filed for a divorce against the deceased eleven days before he was killed. Counsel, Barnwell, stated that witnesses would testify "[t]hey witnessed slapping, hitting around, beating up of the defendant". . . and that the deceased "hit her, [gave] her black eyes", and that on the morning of his death they had a "big quarrel" about the divorce. (tr 17 Apr 2000 @31, 30) Barnwell stated that "there will be a lot of testimony that will support a defense position. My client didn't plan anything. If best, the worst case scenario in this case would be that she was completely provoked and in hot blood, completely." (tr 21 Apr 2000 @ 32) At an earlier hearing Counsel, Barnwell indicated there would be "eight defense witnesses." (tr 10 Dec 99 @ 5)

At the *Ginther*, after the trial, Barnwell testified that she had investigated the defense of the battered spouse syndrome and that she had "done the defense before successfully." (tr 19 Sept 2001 at 24, 25) She also testified that defendant had a personal protection order against her husband and while she did not have evidence that the deceased husband beat her on this particular day, she "did have witnesses that would testify to physical beatings" (tr 19 Sept 2002 at 22 - 26) Barnwell also denied that the defendant had gone after her husband, instigating and taunting him or saying "If I can't have him, nobody else will." (tr 19 Sept 2001 at 23)

Clearly a defense of battered spouse syndrome was available to defendant, Bason, but was not used by attorney Barnwell. In *People* v *Geraldine Margaret Wilson*, 194 Mich App 599 (1992) the Court joined the majority of jurisdictions in the United States in upholding the admissibility of expert testimony on the Battered Spouse Syndrome. That Syn-

drome has been used to describe a woman who is repeatedly, physically and often psychologically abused by their mates, and has come to live with constant fear, coupled with the perceived inability to escape. Eventually she comes to believe that her only options are enduring the abuse, striking back, or committing suicide. *Tourlakis* v *Morris*, 738 F2d. 1128,1134 (SD Ohio, 1990), quoted with approval on page 603. The self defense justification for homicide is based upon the circumstances as they appeared to the defendant, and not as they actually existed. *People* v *Perez*, 66 Mich App 685 (1976) An expert could have explained why defendant remained in the home after being attacked and why she might have chosen, however unconsciously, this particular method of ridding herself of him. Thus attorney Barnwell could have shown why Ms. Bason would sometimes spend time with her husband despite the personal protection order (tr 19 Sept 2001 at 26) and why she would kill him despite the fact that he was not, at that moment, beating on her. But, Barnwell never brought on this defense, despite the preparations and the availability of witnesses, because, she said, "At the time that I rested, I thought that they [the prosecution] didn't prove their case." (tr 19 Sept 2001 at 28)

In the course of the trial the People presented a series of witness to demonstrate their case against Ms. Bason. Following theprosecutions last witness, there was a *Walker* hearing to determine whether defendant's statement would be.admitted. The court decided that it would not be admitted and at that point the people rested their case. (tr 30 May 200 at 81, 83) At this point, however, **defendant rested and presented no defense whatsoever**. (tr 30

May 2000 @ 83). The court went on to find defendant, Bason, guilty as charged, of murder in the second degree (tr 30 May 2000@ 99)

After the court's determination of guilt on 30 May 2000, defense counsel made a post-judgment motion to reopen the case and amend findings as to voluntary manslaughter and involuntary manslaughter as well as negligent homicide. The court proceeded to lecture defendant's attorney on the standards for voluntary manslaughter and the fact that while she may have made a case for it, she had rested without putting on a defense and thus the record was nonexistent. The court said,

> "First there has to be evidence of when the defendant acted, her thinking must be disturbed by emotional excitement to the point that an ordinary person might of acted on impulse without thinking twice from passion instead of judgment.
>
> This emotional excitement must have been the result of something that would cause an ordinary person to act rashly or on impulse.
>
> Second, the killing itself must result from this emotional excitement.
>
> **The record was totally devoid totally devoid of any emotional excitement.**" (tr 16 June 2000 at 5-6)(emphasis supplied)

The court understood that the defendant may have in fact been mentally or emotionally impaired despite her attorney's decision to rest without putting on proofs and at the hearing on the motion to reopen the proofs, weighed "whether or not I ought to allow you to even have a new trial so you

can present other evidence or not let you because you rested." The court recognized that "I didn't hear from any physician. I didn't hear from anybody who could have told me anything about an emotional excitement because you can take into account that the defendant is mentally or emotionally impaired. You may consider that. Now I don't know. That wasn't presented, but I have no evidence." (tr 16 June 2000 @ 8-9)

The court explained that evidence **was** presented about defendant's state of mind at the time she made a statement to police, during the *Walker* hearing, [b]ut we never got around to the state of mind of the defendant at the time of the act." (tr 16 June 2000 at 11)

Indeed there was evidence presented by defendant of spousal abuse. In the course of the *Walker* hearing, the treating psychiatrist during defendant's hospitalization, stated that defendant had told him that her deceased husband had been verbally and physically abusive towards her and that in his opinion, [s]evere stress, such as abuse, could lead to psychosis"—a mental disorder where her reality is impaired. (tr 26 May 2000 @ 15, 25) Another witness, the examining psychologist, testified that she interviewed defendant's family members who reported that her deceased husband had physically and emotionally abused the defendant. (tr 30 May 2000 @ 7-9) All of this evidence occurred only during the *Walker* hearing. But as the court indicated at a subsequent hearing, such testimony may only be considered for purposes of the *Walker* hearing, and **is not trial evidence**. The court said, "I heard Dr. Van Horn who testified in a Walker hearing. And, people don't understand but very frankly I do have the abil-

ity to put that out of my mind because that's all it was for, was for the Walker Hearing." (tr 16 June 2000 @10)

The court was obviously concerned that the defense attorney failed to present any defense whatsoever, and the obvious question of ineffective assistance was not lost on the court, "it seems to be that if I fear that some error has been made of this magnitude, that I do have a right to give a new trial." (tr 16 June 2000 at 17)

It is also worth noting that the prosecutor did not deny that evidence of defendant's altered state of mind existed, but argued it was simply trial strategy to not present a case. The prosecutor said, "I agree with that, and I agree that Miss Barnwell knew the evidence that was out there on the day that she made the decision not to go forward believing that was in her client's best interest at the time."(Id @12-13)

The court went on to grant an evidentiary hearing for a later date, but this hearing was terminated abruptly after an off the record discussion, and the following finding by the court:

> "I have to put on the record that there is a defense that could have been raised. I have no idea that it could have been raised and it is not something I can decide in this particular hearing. What has to be done is this, we're in the posture that this matter was here for sentencing on, so a sentencing has to take place.
>
> I'm quite sure there's going to be a motion for ineffectiveness of counsel and then we'll have a hearing to determine whether or not there was a reason why this defense was not raised. If they

> can establish that there were valid reasons why it wasn't raised then the conviction would stand, but if they cannot then the Court of Appeals or this Court will have to order a new trial."

(tr 18 Aug 2000 @19)

The obvious question is, just what was the attorney's theory of the case? She testified that "At the time that I rested, I thought that they didn't prove their case . . . as to second degree murder because they didn't know if it was purely an accident. I thought that was more plausible at the time that I rested." (*Ginther* hearing 19 Sept 2001 at 27-8)

But was it plausible? The prosecution put on some 16 witnesses and a couple dozen exhibits, **that easily demonstrated because it was unrebutted,** that the parties had fights, with threats going back and forth and the fact that the deceased had children with other women during their marriage, and that at the time of the "accident" he was going to visit one of his lovers, etc, etc. And that an eyewitness, who knew neither of them, observed that the automobile defendant was driving was speeding in excess of 40 miles per hour when she jumped the curb travelled about a hundred feet across the grassy berm then whacked the deceased from the rear. (Vol V 83-90)

How anyone could argue that this was an "accident," and not introduce any evidence on behalf of the defendant's state of mind, or state of her marriage, is quite unbelievable, but attorney Barnwell, no doubt with a straight face, argued that the eye witness "could not say whether the car had lost control . . . . [and that] nothing has been proven by the testimony of the witnesses proffered" (tr V at 91-92)

In reaching her decision, the trial court judge had not the slightest bit of difficulty concluding that "when you're going at least 40 miles an hour to go over this curb and to hit this individual, and knock him out of his shoes, and leave his hat laying on the sidewalk, you are acting in willful and wanton disregard of the likelihood that the natural tendency of this act will cause at least great bodily harm" (tr V at 97),

Even the prosecutor at the *Ginther* hearing appeared to be a bit taken aback when attorney Barnwell stated that her defense theory was that "it was just purely an accident". He then asked,

"PROSECUTOR: Well, let me interject something. Isn't it true that there was testimony from an accident investigator that the tracks on the lawn were a hundred feet, and it was a straight line? Do you think that would be consistent with an accident? Did you believe that at the time?

BARNWELL: Yes, I believed it. I believed it was an accident.

PROSECUTOR: And that the one witness who saw the car hit him, she hit him in the back, apparently as he's walking? And then he bounced into a tree, apparently, and then she deflected off a tree? Does that sound consistent with an accident? Did you believe it at the time?

BARNWELL: Yes. An accident could happen in any way." (tr 19 Sept 2001 at 28

At the same *Ginther* hearing Barnwell demonstrated that she did not really grasp the dynamics of the battered women's syndrome when, despite the defendant's beatings at the hands of her husband

and the personal protection order, she stated, "It had to have been an accident because she loved him very much. It had to have been an accident." (tr 19 Sept 2001 at 11)

And despite the trial court's denial of the motion to grant a new trial after the *Ginther* hearing, it is clear that she had deep reservations about the matter. In her decision the judge said, "I'm really torn here because I see a lawyer who I believe is an excellent lawyer. But I wonder if she got so wound up and personally involved in this case, and so concerned with Ms. Bason that she made some errors. And I'm not even sure how great these errors are, even after this hearing." (tr 19 Sept 2001 at 46)

Barnwell contends her strategy was "trying to read the judge", but acknowledges that "I think I should have taken a break". (tr 19 Sept 2001 at 10)

Barnwell also had the option of making a motion for a directed verdict before deciding whether to put on a case or not. She even acknowledged the value of such a move. She testified that

> "I always do a motion for a directed verdict, which is a test. I test the waters. . . . The Judge has to look at the evidence in the light most favorable to the prosecution. But they say certain things, right? And as defense attorneys, we don't really know exactly which way a person is going, see? But they say certain things which can clue you in. That I forgot to do in my state of euphoria."

(tr 19 Sept 2001 at 12)(emphasis supplied)

As for the decision to not present a case, Barnwell said at the time,

> "Your Honor, I've discussed this case with my client. She's visited my office on numerous occasions with her entire family. We talked about the possibility of not bringing on a case. After discussing this matter again today with my client, and her grandmother, and her pastor who's present, we rest."

(tr V at 83). Barnwell admitted however that she never told Ms Bason that there is no evidence that's been entered so far regarding the passion or the hot blood defense. But she did tell the defendant that "I don't think that they proved anything." (tr 19 Sept 2001 at 17, 18)

Obviously, she was wrong on that account. Defendant was found guilty as charged and later sentenced to 18 to 50 years. Clearly, counsel's performance fell below an objective standard of reasonableness and defendant was prejudiced as a result.

Ms. Bason was denied effective assistance of counsel. She is entitled to a new trial.

II. THE SENTENCE IMPOSED IS DISPROPORTIONATE UNDER *PEOPLE* V *MILBOURN*, 435 Mich 630 (1990) GIVEN THE NATURE OF HIS CRIME AND THE SENTENCE IMPOSED.

In *People* v *Milbourn*, 435 Mich 630 (1990), the Michigan Supreme Court announced a new standard of review to be applied when reviewing a trial court's exercise of discretion in imposing sentence. Under *Milbourn* the reviewing court must apply the "principle of proportionality", that is the Court must analyze **the seriousness of a defendant's crimi-**

nal actions and the defendant's prior criminal record. 435 at 636

In reaching its decision, the *Milbourn* Court noted that the Legislature clearly "intended more serious commissions of a given crime by persons with a history of criminal behavior to receive harsher punishments than relatively less serious breaches of the same penal statute by first-time offenders." 435 Mich at 635. According to *Milbourn* the trial court should sentence a defendant based on "where on the continuum from the least to the most serious situations an individual case falls . . ." 435 at 654.

In the present case, appellant, Lanise Bason, was originally charged with murder in the first degree in the death of her husband. Following the preliminary exam, Ms. Bason was bound over on Murder in the second degree. The court, Judge Jeanette O'Banner-Owens in 36th District Court, said,

> "The Court at this time binds over on murder two subject to any heat of passion argument being made as a form of the defense in the matter. I believe that you have a situation where a wife was treated very bad. Not only to think that there was a woman there that stated he [her deceased husband] had other women and children. I believe that she was suffering under the heat of passion."

(preliminary exam tr at 107)

Defendant, Bason, subsequently had a bench trial in front of the Honorable Vera Massey Jones in Wayne County Circuit Court. Following presentation of the prosecution's case, Defendant's attorney announced that she would **not** put on a defense case. (tr, vol V at 83) The trial court judge then

found Ms. Bason guilty of Murder in the second degree and went on to find inadequate evidence of emotional excitement necessary for the lesser included offense of voluntary manslaughter. (tr V at 94-99)

Guidelines were scored at 162 to 337 months. Defendant was then sentenced to 18 to 50 years—216 months—within the guidelines. (tr 24 Aug 00 at 10, 46) And, while a sentence within the guidelines is presumptively proportionate, *People* v *Hogan*, 225 Mich App 431, 437 (1997), defendant, Bason, believes there are extenuating circumstances in her case that call for a lower sentence. The *Milbourn* Court further recognized:

> "Where a given case does not present a combination of circumstances placing the offender in either the most serious or least threatening class with respect to the particular crime, then the trial court is not justified in imposing the maximum or minimum penalty, respectively."

Milbourn, *supra*, at 654.

Milbourn requires that the appellate court look to both the *crime* and the *criminal history* in determining proportionality.

First, the crime itself needs to be examined. There is no question but that defendant was responsible for the death of her husband, Bryant Branch. As the Presentence Report indicates, "Witnesses observed the defendant driving at a high rate of speed. The defendant jumped the curb and struck the complainant who was walking on the sidewalk with her vehicle, flinging him into a tree and killing him instantly. The defendant lost control of her vehi-

cle and ultimately hit a tree bringing her car to a rest." (presentence at 2)

The second issue, after the crime itself, is the **defendant's criminal history. Defendant has no criminal history**. She has never been arrested or convicted of anything. (see criminal history in presentence report at p 3)

Michigan courts have a history of carefully examining sentences to insure proper punishment. Criminal punishment must fit the offender rather than the offense alone, and sound discretion must be exercised in sentencing matters. *People* v *Coles*,. 417 Mich 523 (1983); *People* v *Triplett*, 407 Mich 510 (1980) Both the Michigan and United States Supreme Courts have found that the basic criteria for determining an appropriate sentence include at least four factors:

1) the disciplining of the wrongdoer;

2) the protection of society;

3) the potential for reformation of the offender;

4) the deterring of others from committing like offenses.

Williams v *New York*, 337 US 241 (1949); *People* v *Coles*. 417 Mich 523, 550 (1983). The question of "reforming the offender" and "protecting society" is particularly relevant here. This case is distinguishable from a situation where, for example, an individual is addicted to some drug and is repeatedly arrested for possession or various crimes committed to feed a habit. Ms. Bason is a 28 year old woman with two children 8 and 10 years old who has never been arrested or convicted of anything and held a regular job as a secretary for the Burnett Baptist

Church. (presentence report at 2, 4) This was a crime of passion and the likelihood of her ever committing another crime or the same crime at some point in the future, is practically zero. This was a once in a lifetime occurrance. So protecting society would not seem to be a major concern. And reformation of the offender, where the offender has no criminal history and exhibits no recidivist tendencies would also seem to dictate the lowest possible sentence. *Milbourn* certainly dictates that result.

"Deterring others" and "disciplining the wrongdoer" require a somewhat different analysis. Certainly some form of punishment is necessary to deter others, and while incarceration is mandated by statute, the length of the term is not. In a crime of passion, such as the present case, the individual committing the crime does not process the decision to commit or not commit the crime in the same way, for example, that an individual contemplating the robbery of a liquor store would—there is no risk assessment analysis. Here, an otherwise normal, law abiding person snaps and does a horrendous thing, kills their spouse with a car. A person who would do this is not really deterred by punishment of any kind, it is a crime of passion.

As for "disciplining the wrongdoer," the trial court did touch on this issue somewhat in acknowledging that defendant had been abused by the deceased but said, "But even if it was an abusive relationship, based on the evidence before me, there was absolutely no reason why this man who was walking down the street should get hit by a car and killed." (sent tr at 44)

But, while the court is correct in saying that there was no evidence before her **in the trial**, there was

evidence in the *Walker* hearing that would certainly go a long ways toward mitigating the punishment in the sentence aspect of this proceeding. In the course of the *Walker* hearing, the treating psychiatrist during defendant's hospitalization, stated that defendant had told him that her deceased husband had been verbally and physically abusive towards her and that in his opinion, [s]evere stress, such as abuse, could lead to psychosis"—a mental disorder where her reality is impaired. (tr 26 May 2000 @ 15, 25) Another witness, the examining psychologist, testified that she interviewed defendant's family members who reported that her deceased husband had physically and emotionally abused the defendant. (tr 30 May 2000 @ 7-9) All of this evidence occurred **only** during the *Walker* hearing.

As the court indicated at a subsequent hearing, such testimony may not be used to determine guilt or innocense and is **not trial evidence**. The court said, "I heard Dr. Van Horn who testified in a *Walker* hearing. And, people don't understand but very frankly I do have the ability to put that out of my mind because that's all it was for, was for the *Walker* Hearing." (tr 16 June 2000 @10)

But this should not preclude the court from using this knowledge, where both parties had the right to cross examin the witness and impeach them, at the sentence hearing where, as here, the victim's family and other interested people address the court and where hearsay is freely admitted via the presentence report and where the rules of evidence do not apply.

The bottom line here is that while defendants attorney may have been ineffective, argument *infra*, in not presenting her defense in the course of the trial, at the sentence stage, the court can consider

information gleaned at the non- trial *Walker* hearing. This is a common sense argument. The length of the prison term should be tailored to fit the individual and this particular individual was physically and verbally abused by her deceased husband and the state's interest in "disciplining the wrongdoer" should take this into consideration. Society as a whole will not benefit by inflicting more punishment than is appropriate, necessary to serve the interests of the people of the state. Here the punishment 18 to 50 years, does not fit the crime and is simply disproportionate to both the offense and the offender.

The sentence needs to be reexamined in light of the principles of proportionality set down by the Supreme court in *Milbourn*,

RELIEF REQUESTED

For all of the reasons cited above, the Court should (1) vacate the conviction and remand for a new trial or (2) remand with instructions to the trial court to review the sentence in light of *People* v *Milbourn* 435 Mich 630 (1990), prepare a new presentence report and resentence the defendant to a lesser term of years.

Respectfully submitted,

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STATE OF MICHIGAN
IN A DISTRICT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

CASE NO. 99-57417
Hon. Jeanette O'Banner-Owens

PEOPLE OF THE STATE OF MICHIGAN,

—VS—

LANISE BASON,

Defendant.

PRELIMINARY EXAMINATION

Before the Honorable Jeanette O'Banner-Owens in the 36th District Court, 421 Madison, Room 3039, Detroit, Michigan on Tuesday, March 30, 1999.

Appearances:

MARIA MILLER, ATTORNEY (P 41317)
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(313) 224-5777

Appearing on behalf of the People

THOMAS E. BINION, ESQUIRE (P 26302)
18520 Muirland
Detroit, Michigan 48221-2203
(313) 861-2995

Appearing on behalf of Defendant

Court Reporter:

Laura M. Smith, CSMR #4318

. . . . There are circumstances clearly here where this woman has a black eye. She's driving around in the car with a black eye. She's driving around in a car afraid of the man that she calls her husband. She's riding around in the car in a situation where he's about to go and see his girlfriend.

So you've got emotions, Your Honor, emotion. Nothing but emotionality happening here. There's no way around. You've got emotionality. And under these circumstances, it seems to me it makes sense for the Court to consider.

The charge in this case is first degree murder. I think it's too high of a charge. This Court can certainly say under these circumstances, first degree consideration can be reduced by these factors, these circumstances, to second degree. And I would ask the Court to do just that, Your Honor. I think that would be more reasonable under the circumstances and under the proofs presented here. Thank you.

THE COURT: Okay, Mr. Binion, a brilliant argument on the issues that have been presented to the Court.

The Court finds that under the circumstances that —various facts that I have gone over as far as my ruling, point to premeditation and deliberation, I find that it was an instance where a person drove from their home and followed their husband which she believed was having—knew was having an elicit affair and called her several times, the girlfriend. So that was very much a part of her conscience, as far as being aware.

Her husband told her to leave them alone and they had filed for divorce. Certainly the heat of passion was going on there when Mrs. Winters started to follow him and it was not a part of the evidence. But was—the part of the black eye did not come out as far as the proofs. That came out as part of the proofs that her injury was from running into a tree. And the face and the legs, too, where she had hit that tree and hit him from the back and then crossed over to the other tree in her car.

This was of great concern to the Court. On one hand you have, no doubt premeditation and deliberation. And no doubt, you have malice of forethought. I believe this Court has mitigating circumstances here as far as the situation and the heat of passion comes in.

The Court at this time binds over on murder two subject to any heat of passion argument being made as a form of the defense in the matter. I believe that you have a situation where a wife was treated very bad. Not only to think that there was a woman there that stated he had other women and children. I believe that she was suffering under the heat of passion. And that there are other things borne out of the relationship, not only her threats but I believe

that there were other sufferings going on there that would make the Court take that into consideration as far as the bind over. Subject to review.

MR. BINION: Thank you, Your Honor.

THE COURT: Murder two. Arraignment date?

THE CLERK: April 16th at 9:00 a.m.

THE COURT: Thank you very much. April 16th for arraignment on the Information. Thank you very much, counselors.

MR. BINION: Thank you, Your Honor.

(At 12:35 p.m.—proceedings concluded)

* * *

STATE OF MICHIGAN
THIRD JUDICIAL CIRCUIT COURT—
CRIMINAL DIVISION

CASE NO. 99-003035

THE PEOPLE OF THE STATE OF MICHIGAN,

—VS.—

LANISE BASON,

Defendant.

BENCH TRIAL
(VOLUME I of V)

BEFORE THE HONORABLE VERA MASSEY JONES
CIRCUIT COURT JUDGE

Detroit, Michigan—Monday, April 17, 2000

APPEARANCES:

For the People:

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For the Defendant:

WENDY H. BARNWELL (P42505)

Court Reporter:

JANICE I. PAYNE, CSMR 3521
(313) 224-2487

THE COURT: Defense opening?

OPENING STATEMENT

MS. BARNWWELL: Your Honor, this Court is well aware of the standard of proof, and that is guilt beyond a reasonable doubt.

The prosecution has charged my client. She's before this Court on a charge of second degree murder. Your Honor, the prosecution witnesses, I expect that they will testify that there was a deliberate act of running into Mr. Branch.

However, this Court is in a position to listening to cross-examination and direct examination to judge their credibility; to judge whether or not they would even have personal knowledge; to judge whether or not these individuals could actually have seen the driver, except for the witness who indicated that he saw my client run into the—Mr. Branch will say that she did it deliberately.

But he did not see her face. He did not know who was in the car. He could not see the person. What he actually saw was a car have direct contact. It ran

directly into the person, which is a complete distinction between a car running directly into somebody, and somebody doing some deliberately.

He could not see her face, and he did not know who was in the car, and therefore, he did not have the personal knowledge; neither is he an expert as to—he's going to testify about speed, et cetera. He's not an expert in those areas. He does not have the expertise that's necessary for him to form certain conclusions. So I think what it is is jumping the gun.

Yes, Mr. Branch died as a result of my client's car hitting him. But they will not be able to prove her state of mind at the time; whether or not she was in a seizure. They don't even know because they don't have that evidence.

They're going to bring in certain witnesses who are quite poisonous and bias. The cousin, who I expect to bring up fabricated testimony about the prior attempt, when in fact my client was the person who was beaten consistently by her husband.

I expect to hear testimony that, oh, he never laid a hand on her. He was a saint, and she was a devil.

My client is the mother of Mr. Branch's two children. They were married legally. My client filed for a divorce against Mr. Branch eleven days before this situation occurred. My client had PPO's taken out against Mr. Branch in 1998. She went down to the City-County Building and she did that because Mr. Branch was assaultive.

You'll hear testimony from people who knew both Mr. Branch and Lanise Bason for years; people who were there from the beginning and the inception of the relationship. My client met Mr. Branch when she was 14 years old, he was 16 years old, and they developed a relationship. That was her first love.

That was her husband. That was the father of her children, and Mr. Branch mistreated her; treated her like a dog, literally.

You will hear testimony from people where there are instances where he indicates to—and he thinks he's joking about it, that the kids should kick her.

The prosecutor is making this look as though it's revenge, it's just mere jealousy. My client—if they can prove anything, it's a worst case scenario somebody who is completely enraged at the time. He had hit her, given her black eyes before this happened. They had a big quarrel that morning. She was very sick, and he came to her. They'll say, oh, she lured him. They didn't hear the conversation. I expect that they'll manufacture it, however.

But because of what has happened in this case, there's a lot of acrimony, a lot of hatred towards her. And I want this Court to listen to the testimony carefully, which I know I have confidence this Court will do.

My client has witnesses who will testify to the abuse. They witnessed slapping, hitting around, beating up.

And there is the prosecution's star witness, Ms. Wynter White, and I expect Ms. White to say that my client, oh, said she was going to kill her and kill the deceased numerous times.

This Ms. Wynter White is an individual who started a relationship with my client's husband for four years, and she called my client's house. She used to ask for her husband, Mr. Branch, that's Ms. Wynter White, knowing fully well that my client was married to Mr. Branch. She knew that my client had children. She knew they were married.

When Ms. Wynter White couldn't find Bryant Branch, she called the house. She used to harass my client. She called. You will hear testimony where she's indicating—I expect her to deny that's not her. "I got a man. I got your man." Taunting. Consistently, always calling my client, taunting and harassing her. That is the girlfriend who's the prosecution's star witness.

And this Court can look to see what bias or what acrimony the girlfriend had in judging her credibility; or what hatred the family of the deceased has towards my client, when they knew fully well that my client always consulted them to try to beg them to stop him from his behavior.

When my client filed divorce complaint against him, he tore up the divorce complaint. He said, "If there's going to be a"—

MS. MILLER: Excuse me. There's some witnesses that have just walked into the room.

(Witnesses excused from courtroom.)

MS. BARNWELL: Now, you heard testimony that my client was afraid of Mr. Branch, but she had this—she was in a vicious circle in respect to her relationship with him and the attempts to get away. She was an abused—she was a battered woman. That's the testimony that you will essentially hear when you listen to this, to the evidence.

There will be a lot of testimony that will support a defense position. My client didn't plan anything. If best, the worst case scenario in this case would be that she was completely provoked and in hot blood, completely.

The other case scenario is that the prosecution would not be able to prove the case but for them

bringing up witnesses who are completely biased against her, and who were not there. And their one witness who was there can truly testify that the car directly ran into the person. But he doesn't know what state of mind. If the person had a seizure. He has no knowledge of whether or not—he has absolutely no knowledge of whether or not my client—what she was thinking, your Honor.

I am confident that this Court will find my client not guilty in this case.

THE COURT: Are the People ready to call your first witness?

STATE OF MICHIGAN
THIRD JUDICIAL CIRCUIT COURT—
CRIMINAL DIVISION

Case No. 99-003035

THE PEOPLE OF THE STATE OF MICHIGAN,

—VS.—

LANISE BASON,

Defendant.

BENCH TRIAL
(VOLUME I OF V)

BEFORE THE HONORABLE VERA MASSEY JONES
CIRCUIT COURT JUDGE

Detroit, Michigan—Monday, April 17, 2000

APPEARANCES:

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For the Defendant:

WENDY H. BARNWELL (P42505)

Court Reporter:

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It's not newly discovered. How do you determine that?

MS. MILLER: According to counsel, this has been something that her client has had for a long time, and waited until the last minute to turn over. So, it's something that has been known to her.

THE COURT: I'll give you time to listen to it.

MS. MILLER: Okay. The other thing, I just received two copies of Dr. Van Horn's report this morning. Actually, a copy of the report for the Miranda rights, and the other copy for the—

THE COURT: You didn't get that until this morning?

MS. MILLER: No, I didn't get that until this morning.

MS. BARNWELL: Your Honor, that's—on Friday I turned that over to the prosecutor's office. I tried to catch Maria.

THE COURT: Excuse me.

MS. BARNWELL: It was turned over on Friday.

THE COURT: Excuse me. Why was it waited that late to get to her?

MS. BARNWELL: She didn't—Dr. Van Horn didn't have the medical records. I subpoenaed them since February.

THE COURT: Excuse me. We've got a big problem here. On something like this, she would have the right to have that report in enough time so that she could get her own expert to look at it.

MS. BARNWELL: Your Honor—

THE COURT: Now, if you didn't give it to her until Friday, she had no way she could get her expert to look at it, and to be prepared to put in any rebuttal to it. It's just like an insanity defense. You have got to give her enough time to be prepared.

MS. BARNWELL: Your Honor, the prosecutor had the medical records that I subpoenaed since February. I kept calling the Court to find out where my medical records were.

THE COURT: Well, why would you call the Court? We wouldn't know.

MS. BARNWELL: I subpoenaed it to the courtroom, and the Court, they kept saying, "We don't have it." Then, finally—

THE COURT: Excuse me. Why would you subpoena medical records to the courtroom?

MS. BARNWELL: I've always subpoenaed medical records to the courtroom because I anticipate a lot of problems from the hospital. In my experience, I've had that. So I always subpoena them to the courtroom.

THE COURT: No, no, no. You know what you do with this? It makes it easy for you to pass the buck to the Court.

MS. BARNWELL: No, your Honor.

THE COURT: Where, if you had subpoenaed the medical records, and you came in and you said, "Judge, I served a subpoena; they have refused to turn over the medical records," I can then order them to do so.

But the way you have done it so that nobody—all you're going to get is the clerk or somebody who answers the phone here saying we haven't gotten the medical records.

MS. BARNWELL: Your Honor, finally, the clerk indicated to me that the practice is when the medical records are received, it's sent to the prosecution, and that's when I contacted the prosecution.

THE COURT: The problem is, Counsel—

MS. BARNWELL: The prosecution had the medical records since early March.

THE COURT: But, no. The problem with it is the way you did it created the problem. Because medical records that come to the Court are usually sent to the Court because the prosecutor has asked for them. So, the way you did it—

MS. BARNWELL: I never had a problem before doing it that way.

THE COURT: Well . . .

MS. BARNWELL: She tried to bring this up on Friday, and I did not have my medical records. I wasn't trying to pass the buck. I always do this in all my

cases because they try and bill me for it. They try and—I've had all those experiences with the hospitals.

THE COURT: Of course.

MS. BARNWELL: So, in all my other cases I've always subpoenaed them to the courtroom so that they recognize how official it is, so that I get them.

THE COURT: Don't do that here anymore, because we don't have time to become an adjunct of your office. You represent the defendant, and it was your responsibility to get the records. I don't have—this is an impartial forum here.

MS. BARNWELL: Your Honor—

THE COURT: Now, she hasn't had time to get prepared for this hearing.

MS. BARNWELL: Your Honor, the prior Friday when we were here, I asked her, "Well, when do you need it?" She says, "Well, by Friday."

My psychologist could not make a conclusion without the medical records. She interviewed my client. She interviewed my client's grandmother. And I had submitted some medical records to her—

THE COURT: You guys have made such a mess of this, and I'm hearing talk, talk, talk, talk, talk. I'm not hearing anybody who followed the legal rules. And forgive me, but that's what I do, and that's what I demand that you have to do in order for us to get a case tried efficiently.

How much time do you need on that?

MS. MILLER: I have the two reports that I just received.

THE COURT: Now, I didn't ask what you had.

MS. MILLER: Well—

THE COURT: I asked how much time do you need?

MS. MILLER: I would like for Dr. Aytch to be able to review these two reports. He won't be back—

THE COURT: I know what you want to do.

MS. MILLER: —until Wednesday.

THE COURT: How much time do you need?

MS. MILLER: Well, he won't be back until Wednesday. I would think that he would have time to review them, hopefully, on Wednesday, and then I would need until Thursday to put him on.

THE COURT: See, when people don't follow the rules—what you've done is you're upsetting the entire court schedule.

MS. MILLER: I had tried to—

THE COURT: It doesn't matter what you tried. If you had done things legally correct, we wouldn't have this problem.

MS. MILLER: When we were in court two weeks ago, I had tried to raise these issues, and wasn't able to. If you could just give me some direction for the future.

THE COURT: What issues were you trying to raise?

MS. MILLER: Well, I hadn't received a report. There were some police reports that counsel was speaking about.

THE COURT: Oh, wait a minute. What do police reports have to do with reports—

MS. MILLER: They don't—

THE COURT: Excuse me—that you didn't get? You see, this is where our problem is. Instead of talking to whatever the subject is, you start and you go around about a long way, and we never get to what I need to hear. The legal reason, the legal objection what you're getting to. Now—

MS. MILLER: I can tell you.

THE COURT: Can you?

MS. MILLER: I'm going to try. On the 7th when we were here before, I had subpoenaed Dr. Fath and Dr. Aytch for a hearing that I had been told about.

THE COURT: Now, I know about that—

MS. MILLER: But I didn't have their—

THE COURT: —because it had to be adjourned because one of your witnesses wasn't here.

MS. MILLER: But I also didn't have reports to prepare them at that time so that we could just start into this at the time, and that's what I was trying to raise to the Court at that time that I was concerned, because it might cause there to be our inability to begin the trial on time.

THE COURT: What did I tell you? If you had some problems with discovery, what?

MS. MILLER: You said to come back today and put it on the record, and we would deal with it then.

THE COURT: No, and that's what we'll do.

MS. MILLER: Okay.

THE COURT: We're dealing with it. Now, what we're going to do in dealing with it is, what happens when you don't get proper discovery?

MS. MILLER: A number of things can happen, but usually—

THE COURT: Number one, we can't use it.

MS. MILLER: Right.

MS. BARNWELL: Your Honor, as to police reports, we have none, so I don't know what the objection is.

THE COURT: Excuse me.

MS. MILLER: I'm not talking about that.

THE COURT: We're not talking about police reports. Get with us. We're talking about your psychiatric reports. Ms. Barnwell, do you understand? She's talking about the psychiatric reports.

MS. BARNWELL: Your Honor—

THE COURT: If they were not turned over to her properly, one of the things that the Judge has the right to do is not to allow you to use them during the trial, and today is the date set for trial.

MS. BARNWELL: Your Honor, the prosecutor knew that I subpoenaed my records because my name was on the subpoena since March 3rd.

MS. MILLER: Your Honor?

MS. BARNWELL: That was our holdup. That was our holdup with our doctor, with our psychologist. She knew. She was in contact with my doctors before I was in contact with my own doctors.

THE COURT: Sometimes hard cases make hard law.

MS. MILLER: I don't know—

THE COURT: It wasn't turned over correctly. I'm not going to allow it to be used. Now, let's move on. What's next? And the reason it wasn't done correctly is because it should not have been subpoenaed to this court. They should have been subpoenaed for you to get them. And if you had problems getting them, then you come back to the Court and enforce them to bring them in. The way it was done, it was no way it could be traced.

MS. BARNWELL: Your Honor—

THE COURT: Now, I've made my ruling. Let's move on to point two.

MS. BARNWELL: What is the Court's ruling about?

THE COURT: I'm ruling you can't use it.

MS. BARNWELL: What is it?

THE COURT: This report of the doctor that you turned over on Friday.

MS. BARNWELL: Your Honor, I would respectfully object based on the fact—

THE COURT: Your objection is noted in the record.

MS. BARNWELL: This is crucial to my client's defense, and the prosecutor did have my medical records, and that was my holdup in supplying it to my doctor. My doctor had to analyze the medical records. She analyzed the medical records, and she gave it to me as soon as she could. And I brought it to the prosecutor's office and tried to contact her Friday, and she as going down the elevator.

Your Honor, I don't think that this is a murder case, and my client does depend on me for her

defense. I did everything that I thought possible, and I followed the way I usually do, pull my medical records, because hospitals—I've had problems with respect to that. So, I don't think that—

THE COURT: Whose medical records are you talking about? Your own client's?

MS. BARNWELL: Yes, my own client's medical records.

THE COURT: Okay. Now, the way—

MS. BARNWELL: As to her state of mind.

THE COURT: Excuse me.

MS. BARNWELL: As to everything that—

THE COURT: Excuse me. Excuse me. Your client only had to sign a release for you to get those medical records. Then you go to the hospital and you try and get them. If they refuse to give them to you, if they try to bill you for them, if any of those things happen, then you come to the Court, and the Court would have ordered them to turn over those medical records, and then you would have gotten them; you! They wouldn't have been sent to float around through this court system. They wouldn't have been sent to the prosecutor's office, where they probably sat on somebody's desk for weeks and weeks because it wasn't their case. They would have gone to you.

Now, I have determined this issue, and we're going to move on.

MS. BARNWELL: Your Honor, with respect to my client's health, her mental status at the time, that's a crucial part of our defense, and I think it would highly prejudice her.

THE COURT: I've heard that. You said it before. What's next?

(No verbal response.)

THE COURT: Are you ready to proceed with opening?

MS. MILLER: Yes, your Honor.

STATE OF MICHIGAN
THIRD JUDICIAL CIRCUIT COURT—
CRIMINAL DIVISION

CASE NO. 99-003035

THE PEOPLE OF THE STATE OF MICHIGAN,

—VS.—

LANISE BASON,

Defendant.

BENCH TRIAL/WALKER HEARING
(VOLUME V of V)

BEFORE THE HONORABLE VERA MASSEY JONES
CIRCUIT COURT JUDGE

Detroit, Michigan—Tuesday, April [sic] 30, 2000

APPEARANCES:

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For the Defendant:

WENDY H. BARNWELL (P42505)

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THE COURT: Defense closing?

CLOSING ARGUMENT

MS. BARNWELL: Your Honor, this Court is well aware of the standard of proof to be met, and that the burden is on the prosecuting attorney. And at the beginning of this case I surmised in my opening that the worst case scenario in terms of the prosecution's ability to carry its burden would be a manslaughter case, your Honor. I don't even think that the prosecution was able to carry its burden as to manslaughter.

I would respectfully request that this Court find my client not guilty. There's reasonable doubt of guilt. The prosecution has to prove each and every element of the offense.

Your Honor, there is no question there are certain objective facts in the case; that is, that my client was the driver of the car that struck her husband. And as a result of him being struck by the car, he died.

There is testimony—I don't quite recall the name of the neighbor who saw the car hit the individual. But he couldn't say whether or not the car had lost control before. He couldn't say whether or not the car—the person in the car had lost control. He couldn't see the person in the car. He didn't know if it was a man or woman.

Your Honor, from that person's testimony, what we have is one object fact. My client was the person driving the car which killed her husband. That's what has been proven here.

THE COURT: Earl Britton, that was his name. His name was Earl Britton. He was the neighbor.

MS. BARNWELL: Yeah. I think that's what Mr. Britton's testimony proved. There was some sort of an effort by Mr. Britton to indicate that the curb was—I think he said yea-high; something like that.

And then I tried to use the ribbon here in the wall of the courtroom to show, you know, if that would be the more accurate height of the curb. And then subsequent to that, I moved for admission of one of the photographs—I don't remember if it's 13 or 14—

THE COURT: Fifteen.

MS. BARNWELL: —which showed that it's a normal street curb like they have in Detroit, and in that residential neighborhood.

Your Honor, nothing has been proven by the testimony of the witnesses proffered. Wynter White was impeached. She's a liar.

The brother of Mr. Branch, with all due respect to him, is a family member; is in severe pain. I talked about biasness, exaggeration in my opening.

The cousin, Mr. Garwood, I do believe that was his name. He talked about threats and so on. But also, it indicates that they had—Ms. Bason had a relationship with her husband. They saw each other. Sometimes she spent nights there. The children were there.

Your Honor, what they have is a situation where things are out of hand, but they have not been able to prove the elements of a crime beyond a reasonable doubt. And I would respectfully request that this Court find my client not guilty.

REBUTTAL

MS. MILLER: Your Honor, just briefly. I don't think that this is a case where the facts warrant a not guilty verdict. I believe that if you wanted to look at the testimony in its most favorable light toward the defendant in this case, that it would be a manslaughter verdict if you wanted to look at it in its most favorable light to her, because you have to look at, was it a time for a reasonable person to be able to cool in this case.

When I argued regarding murder in the second degree, I believe that her drive from where home was, and the length of time it would have taken her to get from her home to Wynter White's home, that that was a reasonable time for her to cool.

In this case, you heard the testimony, and you saw the nature and tenor of Ms. White. That is something that would possibly give rise to, under these circumstances, a manslaughter verdict versus the murder two verdict. But I do not see a not guilty verdict being warranted by the actions of the defendant as testified to by Mr. Britton who saw the accident—

not the accident, but saw what happened; saw what she was doing; did not know if it was a male or female in the car, but heard the car distinctly rev up in an effort to jump the curb and hit this person. And that it was certainly goal-directed in terms of what she wanted to do, and in terms of killing him.

So, I do not think this is an action where there has been any type of excuse or defense that would make the defendant in this matter not guilty.

THE COURT: It's very interesting, if you look at the CJI instructions concerning second degree murder and voluntary manslaughter, they're almost identical. And I've never quite understood, this voluntary manslaughter that I'm talking about is when it's given as a lesser included offense of murder.

There is also the natural meaning of voluntary manslaughter where it's a lesser included offense, and that's—that's where you find the difference. The voluntary manslaughter and second degree are almost identical. But, when it's a lesser included offense of murder, that's where you have some things that come in that are different.

And very frankly, the People have proven that on the date in question, which was February 23rd, 1999, Mr. Bryant Branch was walking down the street of 14126 Birwood. He was headed, quite obviously, towards the home that the evidence shows was a place where he would find this other lady that he was apparently seeing.

Now, I don't know why everybody else doesn't want to say he was seeing her. I don't know why his family didn't want to admit it. Why his brother didn't want to admit it. Why the people didn't want to admit that he was seeing this other lady, I don't understand it. Because apparently, something was

going on because she was calling his wife. They were talking. She admitted it. But they had been talking back and forth. They had been kind of wolfing each other back and forth. So I don't know why the family won't admit this,

But anyway, he was on his way to see this lady, maybe, or to leave a message for her; whatever. And he's walking on the sidewalk. And Mr. Earl Britton says that as he's walking along the sidewalk, a vehicle jumps the curb and comes up on the sidewalk and hits this man.

Mr. Britton did describe the scene—the sidewalk as being a very high one. And the photographs that have been entered evidence that it is not that high of a curb. It's just a normal curb.

But very frankly, I think his description more aptly describes the manner in which he saw the car traveling. The speed at which it went over the curb. Because there's something else. This isn't just a curb and then a small berm before you get to the sidewalk. This is a curb and a large berm before you get to the sidewalk where this man was walking.

It is quite obvious to me that this was an intentional act. And what I've looked for here is either the intent to kill, or to do great bodily harm, or to act in a willful and wanton disregard of the likelihood that the natural tendency of said act would be to cause death or great bodily harm. And I'm quite convinced that the defendant did not intend to kill. I know that. She didn't intend to kill this man.

But at the time she acted, she did an act that anybody who thinks about it would have known that this was going to cause at least great bodily harm. You don't hit an individual with an automobile without causing great bodily harm. And when you're

going at least 40 miles an hour to go over this curb and to hit this individual, and knock him out of his shoes, and leave his hat laying on the sidewalk, you are acting in a willful and wanton disregard of the likelihood that the natural tendency of this act will cause at least great bodily harm.

They've got second degree murder. The question becomes, is it reduced to voluntary manslaughter? And when I look at the instruction when you look at voluntary manslaughter as a lesser included offense of murder, it requires that before the crime of murder may be reduced to voluntary manslaughter, first you have to find that when the defendant acted, her thinking must be disturbed by emotional excitement to the point that an ordinary person might have acted on impulse without thinking twice from passion instead of judgment.

This emotional excitement must have been the result of something that would cause an ordinary person to act rationally or on impulse. Our law does not state what things are enough to do this. That is for the trier of fact to decide.

This emotional excitement had been going on between them for quite sometime. This wasn't something that just happened. It's not the classic incident as the people point out where a man walks into his house and finds his wife in bed with another man, and out of impulse acts on that. This is something that has been going on for a long time. Arguments back and forth. She's talking to the woman on the telephone.

The only thing is in this situation, Mr. Branch isn't here to testify, and the defendant need not testify. So I have no idea what had happened just prior to the time that the defendant put her foot on that gas and

revved that car up. But I know because Mr. Branch was walking down the street, that the killing itself could not have resulted from this emotional excitement, because there had been a break in time.

There was enough time, even if they had had an argument, for her to have calmed down, and for reason to resume its control. And therefore, the People have in this case proven second degree murder, and I so find.

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STATE OF MICHIGAN
THIRD JUDICIAL CIRCUIT COURT
FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

Case No. 99-003035-01

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

—VS.—

LANISE BASON,

Defendant.

EVIDENTIARY HEARING

PROCEEDING HAD and taken in the above-entitled cause before the HONORABLE VERA MASSEY JONES, Judge of the Third Judicial Circuit Court Criminal Division for the County of Wayne in Detroit, Michigan, on Friday, August 18, 2000.

APPEARANCES:

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Appearing on behalf of People.

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Appearing on behalf of Defendant

THE COURT: I have no idea what questions are going to be asked. When there are questions about that concern make your objection I'll rule on it at that time.

MS. MILLER: I will.
Thank you.

MS. VAN HORN: Firoza B. Van Horn.

THE CLERK: Please raise your right-hand. Do you solemnly swear or affirm the testimony you are about to give in the matter now pending before the Court will be the truth under the pains and penalties of perjury?

THE WITNESS: Yes.
(Whereupon the witness was sworn at 12:07 p.m.)

THE COURT: Counsel, whenever you're ready.

FIROZA B VAN HORN

having first been called to testify and duly sworn; testified as follows:

DIRECT EXAMINATION

BY MS. BARNWELL:

Q Witness, could you kindly state your name for the record.

A Firoza F-I-R-O-Z-A initial B last name Van Horn V-A-N H-O-R-N.

Q What is your occupation?

A I'm a psychologist.

MS. MILLER; Your Honor, during the course of the last trial matter that involved Dr. Van Horn we had heard her qualifications and we would just incorporate our stipulation into this hearing.

THE COURT; Okay. Thank you.

CONTINUING BY MS. BARNWELL:

Q Dr. Van Horn do you know Lanise Bason?

A Yes.

Q Did you see her?

A Yes.

Q And you had testified at an earlier hearing concerning her ability to waive her Miranda Rights?

A Yes.

Q You had also seen her for any other purpose other than that?

A Yes.

Q What was that?

A I saw her for criminal responsibility and diminished capacity.

Q And when you saw her—on what dates did you see her?

A I saw her on March 24th and April 7th of this year.

Q Did you conduct an examination of Ms. Bason?

A Yes.

Q What did that comprise of?

A I interviewed her, I administered some psychological tests, I spoke with her family, I read the medical records.

Q And did you review any documents?

A Yes I reviewed the Detroit Police Investigator's Report, witnesses' statements other psychological statements that were done by other psychologists. I reviewed her statement, and other records that while available to me regarding medical services that were rendered to her.

Q And Dr. Van Horn, in your report you give her version of the offense of what happened and could you tell the Court what it is.

THE COURT: Excuse me. Why are you putting that in?

Did you understand why we're here?

MS. BARNWELL: Yes, Your Honor.

CONTINUING BY MS. BARNWELL:

Q Did you get a history from Lanise Bason?

A Yes.

Q What did that history consist of?

A I took a family history, background history since she was a child and school history, as well as medical and her relationship with other people.

Q Did that history include a relationship with her husband?

A Yes.

Q Could you tell the Court what that history was marital history?

THE COURT: Was that where you object to the hearsay.

MS. MILLER: Yes, Your Honor.

I believe that if she is going to testify consistent with the report there's hearsay that's in the report that details things that she can't testify to as an expert, and it's my understanding that she can testify to what is Battered Spouse Syndrome, and that's under **People versus Chisel**. But she can't actually recount hearsay that support that.

THE COURT: I have to sustain that objection.

CONTINUING BY MS. BARNWELL:

Q Based on your examination and the history that you received from different sources what was your conclusion?

MS. MILLER: Well, I don't believe she can make a conclusion either because we don't have foundation for that.

THE COURT: Well, I thought when you were talking about criminal responsibility and diminished capacity that's what the examination was for. So I assume now she's asking what was her conclusion that she's asking for criminal responsibility and diminished

capacity, and you will agree she can interest an opinion in that regard, right.

MS. MILLER; Regarding that, yeah.

THE COURT: That has to be what we're talking about, I heard no foundation for anything else.

CONTINUING BY MS. BARNWELL:

Q As to the issue of criminal responsibility what was your conclusion on that?

A She was not criminally responsible.

Q What do you base that on?

A On the history that I gathered from her and the psychological test.

Q In your report you stated that it is my opinion that the manner in which the crime was committed lend support to Ms. Bason's loss of reality, disorientation, and grossly disorganized behavior could you explain that to the court.

A Ms. Bason was abused physically—

MS. MILLER: Your Honor, I'm going to object to that again it's a conclusion that she makes that she—

THE COURT: Can I have you both approach the bench for a movement.

(Off the record at 12:13 p.m.)

(Back on the record at 12:19 p.m.)

THE COURT: I have to put on record that there is a defense that could have been raised. I have no idea that it could be raised and it is not something I can decide in this particular hearing. What has to be done is this, we're in the posture that this matter

was here for sentencing on, so a sentencing has to take place.

I'm quite sure there's going to be motion for ineffective assistance of counsel and then we'll have a hearing to determine whether or not there was a reason why this defense was not raised. If they can establish that there were valid reasons why it wasn't raised then the conviction would stand, but if they cannot then the Court of Appeals or this Court will have to order a new trial.

Because I could not believe that there could be absolutely nothing in this case based upon what I heard. But we are here today for sentence.

Now the defense tells me that you are not ready for sentence.

MS. BARNWELL: That's correct, Your Honor.

THE COURT: Well she's going to be remanded to the jail. You give my clerk the date you want when you can get the witnesses here for the sentencing.

And Madam clerk be sure it doesn't make the presentence report, so old or if it does make it so old get us a new one.

MS. BARNWELL: Your Honor, just to speak on behalf of Ms. Bason. Her two minor children are here in the courtroom, they left with her grandmother and her has a cancerous tumor. And the grandmother who has always been here has in chemotherapy right now at this movement. Your Honor, so I would respectfully request that my client be allowed to be out until the day of sentencing because she has always come to court.

THE COURT: No. No. No.

And that's what I'm trying to tell you all, that you have not realized what dragging this thing out has done. This was a second degree murder case decision which meant all the time that she was eventually was going to have to go to jail unless it was set aside. It's going to have to go to the Court of Appeals for them to decide or else it will be an evidentiary—they are going to send it back for an evidentiary hearing anyway. And all of us who are lawyers know that.

Now she's remanded. We'll let you make some telephone calls to try and get family members down here to pick up the children if not we'll in fact have to call the Family Independent Agency.

MS. BARNWELL: Your Honor, there are people here, but in terms of the—

THE COURT: Thank you very much, I've denied your request.

MS. BARNWELL: Your Honor, in June you had indicated that we would have this hearing and that we would—you would determine whether or not you would grant a new trial or reopen the case, and I think the Court's in a posture—

THE COURT: I am not going to grant you a new trial because I cannot in fact make a determination of whether or not there was ineffective assistance of counsel. Because I have to have a hearing at which time you would be called to testify. And I can't have that hearing because you are the only attorney of record at this time. Okay.

She's remanded for sentencing.

Now you notice and this is something that everybody has to pay attention to. Everybody has to pay

attention to. Now we're seeing disrespect on both sides so, and she is the Defendant and she has to appear for sentencing here in this Court. Okay, All right, what's the date.

THE COURT: When can you get these witnesses here.

MS. BARNWELL: Thursday is a good day.

THE COURT: That's good.

MS. MILLER: That's fine, Your Honor, thank you.

MS. BARNWELL: We're talking about the 24th.

THE COURT: Yes.

MS. MILLER: Yes.

THE COURT: Thank you.

MS. MILLER: Thank you, Your Honor.

THE COURT: And I suggest that both of you talk to family members and tell them I will not tolerate the kind of conduct that's gone on in here today.

THE COURT; Thank you, Doctor,

MS. VAN HORN: Thank you, Your Honor.

THE COURT: Unfortunately, we may be seeing you again because I've got a feeling that the Court of Appeals is just going to send this case back.

(Whereupon proceedings were concluded at 12:23 p.m.)